UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

ASARCO LLC

and	**Case**	**28-CA-154886**
		28-CA-155737
UNITED STEEL, PAPER AND FORESTRY,		**28-CA-158199**
RUBBER, MANUFACTURING, ENERGY,		**28-CA-163008**
ALLIED INDUSTRIAL AND SERVICE		**28-CA-163333**
WORKERS INTERNATIONAL UNION,		**28-CA-167139**
AFL-CIO, CLC		
and	**Case**	**28-CA-160210**
MANUEL ORCASITAS, an Individual		

Sandra Lyons, Esq., and
Alexander J. Gancayco, Esq.
for the General Counsel.

Richard A. Russo, Esq., and
Abby J. Clark, Esq., and
Roy G. Davis, Esq.
(Davis & Campbell, LLC)
For the Respondent

Mariana Padias, Esq., and
Jay Smith, Esq.
For the Charging Party

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. This case was tried before me in Phoenix, Arizona over 14 days in March, May, and June 2016, based upon charges filed by the United Steel, Paper And Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("Steelworkers") and a charge filed by Manuel Orcasitas. On February 19, 2016, the Regional Director for Region 28 ("Regional Director"), on behalf of the General Counsel, issued a Fourth Consolidated Complaint and Notice of Hearing

alleging that ASARCO LLC ("Respondent" or "ASARCO") violated the National Labor Relations Act ("Act") by: promulgating and maintaining rules in violation of Section 8(a)(1); interrogating and threatening employees in violation of Section 8(a)(1); firing Manual Orcasitas in violation of both Sections 8(a)(1) and 8(a)(3); dealing directly with employees in violation of Section 8(a)(5); making unilateral changes in violation of Section 8(a)(5); refusing to provide the Union with information in violation of Section 8(a)(5); and implementing its last, best, and final offer at a time when no bargaining impasse existed because of unremedied unfair labor practices, in violation of Section 8(a)(5). After the hearing opened, on April 28, 2016, the Regional Director issued a separate complaint alleging ASARCO, in pertinent part, fired Kenneth Dickey in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act. The April 28, 2016 complaint was then consolidated with the February 19, 2016 complaint ("Consolidated Complaint"). Respondent denied committing any of the alleged unfair labor practices.[1] (Tr. 673; GC. 1(a)(f), 1(a)(h); GC. 83, 84)

Based upon the entire record, including my observation of the witnesses and their demeanor,[2] and after considering the briefs filed by the General Counsel, the Union, and Respondent,[3] I make the following findings of fact and conclusions of law.

I. Jurisdiction and Labor Organization

Respondent admits that it is a limited liability company with offices and places of business in Hayden, Arizona (Hayden), Kearny, Arizona (Ray Complex), Sahuarita, Arizona (Mission Complex), Amarillo, Texas (Amarillo Copper Refinery), and Marana, Arizona (Silver Bell Mine), and has been engaged in the business of mining, smelting, and refining copper. The company further admits that it annually purchases and receives at its Arizona facilities goods valued in excess of $50,000 directly from points outside the State of Arizona. Asarco admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. Accordingly, this dispute affects commerce and the Board has jurisdiction pursuant to Section 10(a) of the Act. Respondent also admits, and I find, that the Steelworkers and the following unions are labor organization within the meaning of Section 2(5) of the Act: Steelworkers Local 886-2; Steelworkers Local 915; Steelworkers Local 937; Steelworkers Local 5252; Steelworkers Local 5613; International Brotherhood of Electrical Workers ("IBEW") Local 518; IBEW Local 570; IBEW Local 602; International Association of Machinists and Aerospace Workers, Local 519; International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmith, Forgers and Helpers, Local 627; International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local 104; International Union of Operating Engineers, Local 428; United Brotherhood of Carpenters and Joiners of America, Millwrights Local 1607; and the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local 469. (GC. 1(a)(f),

[1] Transcript citations are denoted by "Tr." with the appropriate page number. Citations to the General Counsel, Respondent, and Union exhibits are denoted by "GC." "R." and "U." respectively. Transcript and exhibit citations are intended as an aid, as factual findings are based upon the entire record as a whole.

[2] Credibility resolutions are based upon witness demeanor. See *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078–79 (9th Cir. 1977). I have also considered the inherent probability of the testimony and whether it was in conflict with credited testimony or documentary evidence. Testimony contrary to my findings has been discredited.

[3] The parties filed briefs in August 2016 and supplemental briefs in September 2016.

1((a)(h). At all material times, the above labor organizations were signatories to an agreement authorizing the Steelworkers to act as chief spokesperson on their behalf regarding collective bargaining with ASARCO. (Tr. 1393) The term "Union" as used herein refers to both the Steelworks and all the other listed labor organizations.

II. Background

ASARCO is a copper mining company based in the United States and owned by Grupo Mexico S.A.B. de CV, a holding company based in Mexico with interests in both the mining and railroad industries. *ASARCO LLC v. Barclays Capital, Inc.*, 702 F.3d 250, 254 (5th Cir. 2012); *ASARCO LLC v. Americas Mining Corp.*, 396 B.R. 278, 299 (S.D. Tex. 2008). ASARCO was purchased by Grupo Mexico in October 1999 for over two billion dollars; thereafter ASARCO became a wholly owned subsidiary of Grupo Mexico. *Americas Mining Corp.*, 396 B.R. at 278, 301 (S.D. Tex. 2008).

The copper industry is highly cyclical, with companies having little ability to influence the actual price of copper. Id. at 303. In August 2005, faced with low copper prices, "debt, cash flow deficiencies, environmental liabilities, and a striking work force, ASARCO filed for Chapter 11 bankruptcy." *Baker Botts L.L.P. v. ASARCO LLC*, 135 S. Ct. 2158, 2163 (2015); see also *Barclays Capital, Inc.*, 702 F.3d at 254 (ASARCO's August 2005 bankruptcy petition was "precipitated by a mounting labor crisis, billions of dollars in environmental and asbestos liability, and a decline in copper prices.") (internal quotations omitted). (Tr. 1396) The chart below in Figure 1 shows the price of copper from January 2003 through January 2017.[4]

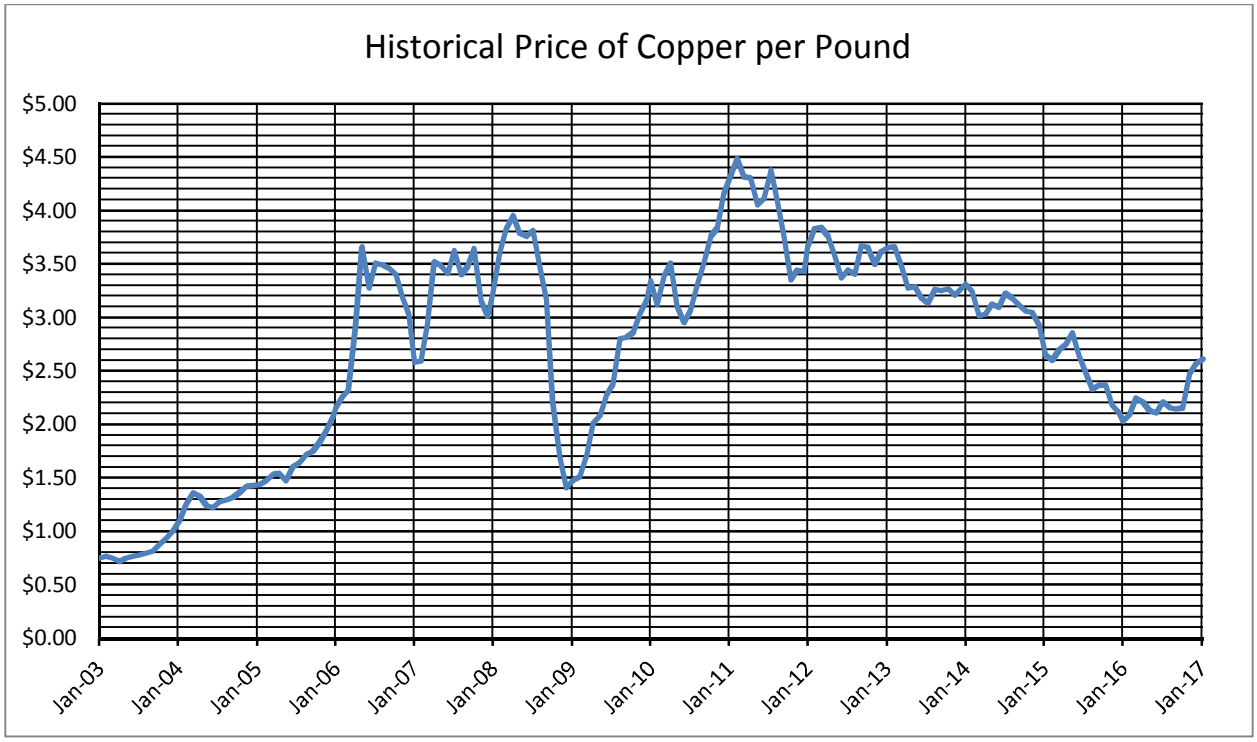
While ASARCO was in bankruptcy, the price of copper started to rise, and the company reached out to the Steelworkers to negotiate a new collective-bargaining agreement. *In re ASARCO LLC*, 420 B.R. 314, 346 (S.D. Tex. 2009). The Steelworkers led a group of multiple labor unions, which all represented ASARCO employees, in bargaining with the company for a new agreement. A new contract, which was approved by the Bankruptcy Court, was finalized in 2007. Id. The term of the agreement, referred to as the Basic Labor Agreement or "BLA," ran from January 1, 2007 through June 30, 2010.[5] (GC. 4) (Tr. 24, 36, 1392)

Before the BLA was scheduled to expire, in June 2010 the parties agreed to a one-year extension. In 2011 the parties again agreed to extend the BLA – until June 30, 2013. In June 2013 the parties agreed to extend the BLA indefinitely, until such time as either party submitted a notice of termination. (GC. 12; Tr. 1395-97)

[4] I take judicial notice of the price of copper during this period. See *Stan Lee Trading, Inc. v. Holtz*, 649 F. Supp. 577, 582 (C.D. Cal. 1986) (court takes judicial notice of the price of gold); Fed. R. Evid. 201. There can be little dispute that copper is traded daily and prices are listed each day in multiple financial publications including the Financial Times. See https://markets.ft.com/data/indices/tearsheet/historical?s=BRHG:REU (last accessed on June 15, 2017). Copper prices are also complied by the International Monetary Fund. See www.imf.org/external/np/res/commod/External_Data.xls (last accessed on June 15, 2017).

[5] Along with the BLA, which applies to all employees, the parties also entered into five separate supplemental local agreements, covering workers at each specific location: the Ray Complex, Mission Complex, Amarillo Copper Refinery, Silver Bell Mine, and Hayden Smelter. (GC. 4, 5, 6, 7, 8, 9; R. 47) The parties dispute which document is the proper Ray local supplement. (GC. 6, R. 47; Tr. 1500-01, 2296-2297)

Figure 1



III. ASARCO's Operations

ASARCO is a fully integrated miner, smelter, and refiner of domestic copper. The company operates three open pit mines and related operations in Arizona, and a processing facility in Amarillo, Texas. (Tr. 1820; R. 5)

The Ray mining complex ("Ray" or "Ray Complex") is located in southeastern Arizona and consists of an open pit copper mine, a concentrator, and a solvent extraction-electrowinning (SX-EW) plant. The Hayden operations ("Hayden" or "Hayden Smelter"), located 20 miles south of the Ray Complex, consist of a copper smelter and concentrator. At the Mission mine ("Mission" or "Mission Complex"), which is south of Tucson, Arizona, Respondent operates an open pit mine, and two concentrators. At the Silver Bell mine ("Silver Bell") the company operates an open pit mine, and a SX-EW plant. Finally, in Amarillo, Texas, ("Amarillo") the company further refines copper and also produces copper cake and copper coil, known as rod, that is then sold into the open market. Copper cake refers to large copper slabs sold for coinage to buyers like the United States Mint, or to the plumbing and electrical industry. Copper coil is sold to various buyers, like the automobile industry, for use as wire. (Tr. 1779, 1824-39; R. 5)

In 2015, ASARCO produced 179,343 tons of copper. Producing refined copper products from raw ore is a multi-step process involving hundreds of employees. Ore is blasted from open pit mines and then loaded into 400-ton trucks or railroad cars using enormous shovels and loaders. To blast the material, large machines drill 10 ½ inch diameter holes vertically into the

rock in a designated pattern. The drill holes are filled with explosives; when detonated the rock is fractured into pieces, between 8 to 14 inches in size. (Tr. 1779, 1788-89, 1817-21; R. 5)

The next step depends upon the composition of the ore itself. Sulfide ore is transported to a concentrator. Leach ore is taken to a leach dump, and then goes through a SX-EW plant. The Ray mine, which is Respondent's largest open pit mine, contains both sulfide and leach ore. The Mission mine contains only sulfide ore, while Silver Bell is strictly a leaching operation. (Tr. 1781-85, 1812, 1823)

Leach ore is placed in large dumps, compacted, and piled 15 to 20 feet high. The aggregate is then sprinkled with sulfuric acid which leaches through the ore and dissolves the copper. The dissolved copper solution, which contains about 1 gram per liter of copper, is collected in ponds and pumped to the SX-EW plant to extract the copper. At the SX-EW plant, a wafer thin starter sheet is placed into the copper solution along with a lead anode. Electricity is run through the material and copper is plated from the solution onto the starter sheet. The final product is called a copper cathode and is 99.99% pure copper. The cathodes are then sent to Amarillo for final processing. (Tr. 1784, 1808-11, 1830-37; R. 5)

At Ray, half of the sulfide ore, which is about one-half percent copper, goes to a concentrator located at the Ray Mine, while the other half is transported to the Hayden concentrator.[6] At the concentrator, there is a crusher and then a series of mills that grind the material into a continually finer consistency. When the ore goes through the initial crusher, the material is crushed into about 5 inch size rocks. It then goes through a series of mills. These are basically rock tumblers with steel liners, which have steel balls or steel rods inside. As the mill rotates, the rock is crushed into smaller and smaller pieces. Eventually, when the material exits the last mill, it is the consistency of talcum powder. Lime is added, along with pine oil and other additives, and the material goes into large vats where it is stirred slowly while air is introduced to the mixture until it starts to froth. Copper attaches to the froth bubbles, and the copper froth is scooped off, filtered, and then dried; the resulting material is called copper concentrate and is about 25%–30% pure copper. The copper concentrate then goes to the Hayden smelter. (Tr. 1782-83, 1799-1806, 1819-20, 1832, 1833)

At the smelter, the concentrate is melted in a flash furnace. The molten copper, which also contains some iron and sulfur, drops to the bottom as impurities are floated from the top. The molten metal runs out a hole in the bottom of the kiln and is then transported to the convertor furnace where the iron and sulfur is burned off. At that point the copper goes through yet another furnace and is then poured into molds and cooled. This product, which is about 98% pure, is called copper anode and is transported to Amarillo for final processing. (Tr. 1834-35)

At Amarillo, the copper anode from Hayden is put into a solution with a starter sheet; electricity is added and the copper attaches to the starter sheet. The resulting copper cathode is 99.99% pure. This copper, along with the copper cathodes from Ray and Silver Bell are then used to produce either copper cake or copper coil. (Tr. 1836-39)

[6] The phrases "mill" and "concentrator" are used interchangeably. (Tr. 1780-82) Unless otherwise noted herein, the term concentrator is used to describe the facility that includes the both the crusher and the various mills.

IV. Bargaining History

Although neither party had terminated the BLA, negotiations for a new agreement started in May 2013. Manny Armenta Sr. ("Armenta Sr."), a sub-district director for the Steelworkers, served as the Union's lead negotiator. Historically, negotiations were split into what the parties called "big table" and "small table" negotiations. Big table negotiations would occur in Tucson, Arizona with the entire Union bargaining committee present, and involved the general terms in the BLA which applied to all locations. Small table negotiations concerned matters specific to each specific work site, as listed in the various local supplements. (Tr. 1386, 1393-98)

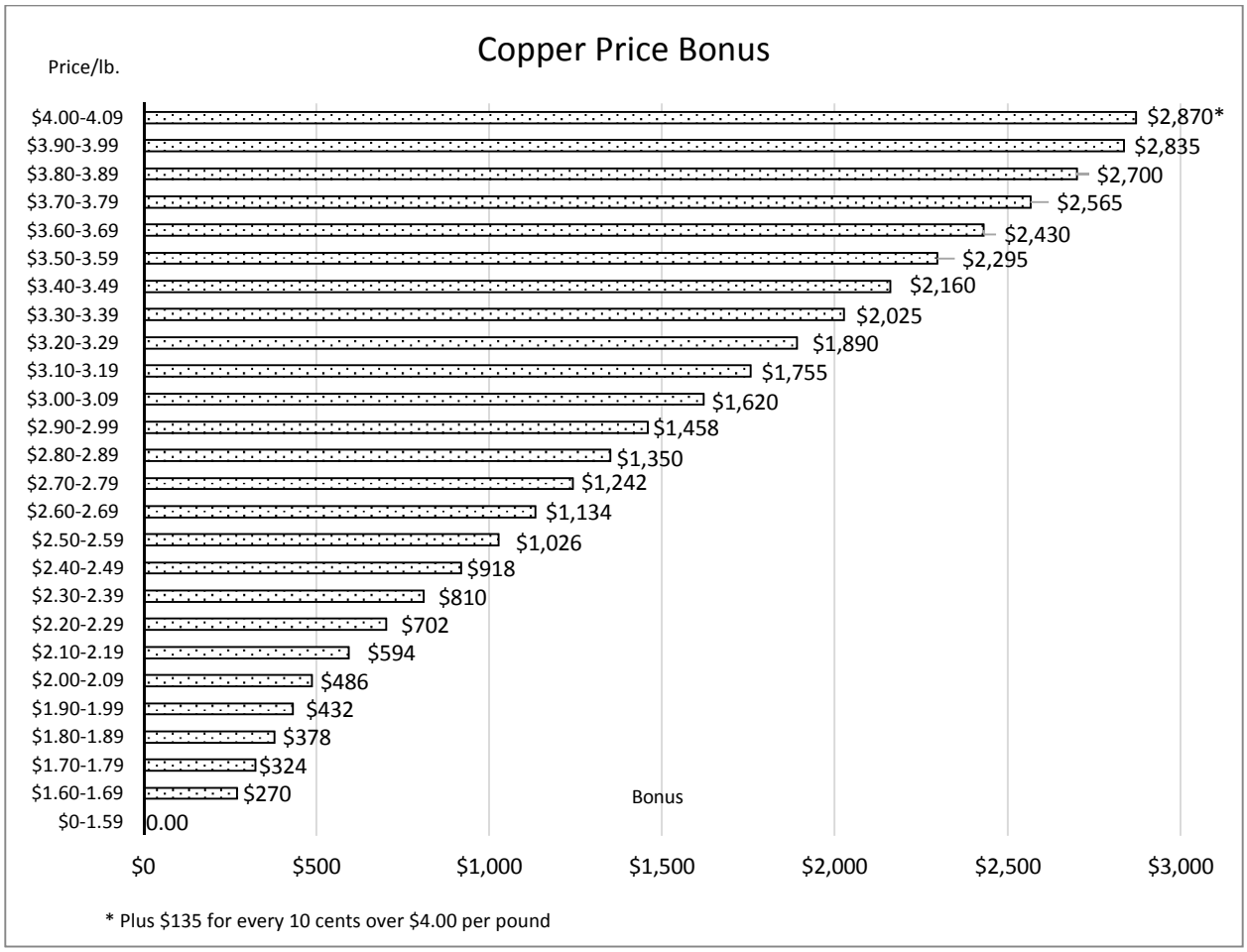
For these negotiations the Union decided that both big and small table negotiations would occur together, during big table negotiations. The Union wanted to negotiate everything in one setting so as to avoid any misunderstandings regarding the local agreements; ASARCO agreed. The parties also agreed to bargain noneconomic issues first, before moving on to economic items. (Tr. 1398-1402)

ASARCO presented its initial set of contract proposals to the Union in June 2013, which called for an extensive revision of the BLA. For example, ASARCO's initial proposal required employees to work an extra 560 hours before being eligible for vacation, eliminated the vacation bonus, eliminated training bonuses, completely rewrote the management rights clause – giving the company broad and sweeping rights, made extensive changes to the established grievance and arbitration procedure, eliminated the provision calling for company neutrality and a card check procedure for future organizing, gave the company complete discretion to subcontract or contract out bargaining unit work, and discretion to require employees to work extended shifts. Armenta Sr., who had negotiated many contracts with ASARCO in the past, testified that he had never seen an original proposal from the company with such extensive changes to existing working conditions. He described it as "almost a complete rewrite" of the noneconomic proposals in BLA. This signaled to the Union that they were in for a long and hard process to negotiate a new agreement. (Tr. 1400-01; GC. 13)

Notwithstanding, as bargaining progressed, the parties started reaching agreement on various non-economic proposals. Between May 2013 and January 2015 the parties reached tentative agreements on approximately 65 different non-economic proposals. (R. 2)

By early 2015, the parties had moved onto economic items. On April 3, 2015, ASARCO sent the Union a contract proposal for a three year agreement, and modified previous company proposals involving the copper price bonus, future retiree healthcare, pensions, 401(k) plan, and health insurance. The proposals were attached to a letter from Respondent, describing its proposals and the noting company's intent on controlling costs, including labor costs. For the copper price bonus, Respondent withdrew its proposal to change the payout formula and introduce a production requirement. However, Respondent was firm that only workers employed prior to July 1, 2011 would receive a copper price bonus, and that the bonus would start only when the average quarterly price of copper was above $2.80 per pound with a $4.00 cap. Under the existing BLA, workers started receiving a bonus when the quarterly copper price was $1.60 per pound or higher. Figure 2 sets forth the copper price bonus structure under the existing BLA. (R. 33; Tr. 1402)

Figure 2



Respondent also proposed that employees retiring during the contract's term could receive healthcare until either age 65 or until they were entitled to Medicare, at which point would be no longer eligible. Under the BLA, all retirees received healthcare coverage, and there was no cutoff based on age or Medicare eligibility. For health insurance, the company was proposing to increase monthly employee premiums. Under the BLA, as modified in 2011, employees paid $11.42/month for single coverage; $23.92/month for single plus one dependent; and $37.67/month for family coverage. Under ASARCO's April 3 proposal, premiums would be $50/month for single coverage; $105/month for single plus one dependent; and $150/month for family coverage. Respondent also stated that it was firm on its alternate work schedule/extended shift proposal, which gave the company complete discretion to put employees on extended shifts.[7] Regarding pensions, the company had previously proposed freezing the pension plan, but agreed to adopt the Union's proposal that only employees hired before July 1, 2011 would be covered by the plan. As for its 401(k) plan, the company offered to allow employees to defer up to 75% of their pay to the plan, with the company fully matching contributions up to 6% for

[7] Under the existing BLA both the company and the Union had to agree before workers could be placed on extended shifts. (GC. 4, Art. 5)

those employees hired after July 1, 2011; employees hired before that date would receive a 50% match. Respondent also proposed successorship language which would assist the company in the event of a future sale. Finally, the company rejected all of the Union's proposals that were not previously TA'd, including the Union's proposal for a wage increase, and increase in shift differentials. (R. 33)

On May 11, 2015, the Union submitted its own set of contract proposals to ASARCO, including a comprehensive proposal on the payment of a copper price bonus, eliminating the bonus when the price of copper was less than $2.60 per pound, capping the bonus payout at $4.00 per pound, and keeping the existing payout for prices between this range. The Union offered to accept ASARCO's proposal for alternate work schedules/extended shifts and the existing BLA language on pensions, if ASARCO accepted the Union's outstanding proposals on 401(k), post June 2011 hires, retiree healthcare, a $1,500 ratification bonus, and the company's withdrawal of its proposal on Retiree Life Insurance Benefits.

Regarding pensions, the Union agreed to maintain the current BLA language and the existing pension agreement. For retiree healthcare, the Union proposed that employees retiring during the duration of the agreement would be eligible to receive retiree healthcare until they reached age 65 or were otherwise eligible for Medicare; participants would pay a $100 monthly premium. Under the Union's 401(k) proposal, employees could defer up to 75% of their pay to the plan, and ASARCO would completely match employee contributions up to 6% for employees after July 1, 2011. Workers hired before this date would receive a 50% contribution, as set forth in the existing BLA. Finally, the Union proposed a new section for employees hired after June 30, 2011; these workers, under certain circumstances, would be eligible for retiree health and life insurance, and receive a $7,500 severance in the event of a layoff due to plant closure. (GC. 101, 102)

On May 12, 2015, ASARCO submitted another proposal package, noting its desire to control labor costs, with 11 specific proposals: copper price bonus, future retiree healthcare, pensions, 401(k), active welfare benefits, successorship, alternate work schedules, duration, wages, shift premium, and ratification bonus. Under Respondent's copper price bonus proposal, only those employees hired before July 1, 2011 were eligible for a bonus, which would start when the average quarterly price of copper was above $2.70 per pound and it was capped at $4.00 per pound, using the existing payment formula for eligible recipients. Respondent proposed a three year contract duration, and only those employees eligible to retire during the contract's three year term would be eligible for future retiree healthcare. (GC. 100)

On May 15, 2015, the Union submitted another proposal package agreeing to keep the status quo regarding pensions, and accept the company's alternate work schedule proposal. The Union also agreed to withdraw its proposal for a shift differential and a $1,500 ratification bonus. These were contingent upon the company accepting the Union's proposed $1.75 annual wage increase, and its proposals on a copper price bonus, 401(k), successorship, retiree healthcare, post June 2011 hires; the company would also have to withdraw its proposal on retired employee life insurance. (GC. 103)

On May 15, ASARCO also submitted a proposal to the Union; it was Respondent's "Last, Best, and Final Offer" ("Final Offer"). (GC. 14) Respondent informed the Union the Final Offer contained all the compromises and concessions the company was willing to make. The key points of the Final Offer, which also incorporated the parties' tentative agreements, are as follows:

- Duration. Three year duration.

- Copper Price Bonus. All employees, regardless of hire date, were eligible for the bonus which starts when the average quarterly price for copper was $2.70 per pound and would be capped at $4.00 per pound. The existing BLA formula would be retained for bonuses between that range. In comparison to the BLA – Respondent's Final Offer eliminated bonus payments when the price of copper was between $1.60 to $2.69, and eliminated any increases in the bonus when the price of copper exceeded $4.00 per pound.

- Future Retiree Healthcare. Employees who retire, or are eligible to retire, through the expiration date of the new agreement would be entitled to retiree healthcare. Employees and their spouses could participate until they reached age of 65 and were therefore eligible for Medicare. Employees eligible for retirement after the expiration of the new agreement would not be eligible for healthcare upon retirement. Under the existing BLA – retirees continued to be eligible for company sponsored health care even after the age of 65/Medicare eligibility. Also, under the existing BLA all employees who retired on or after the effective date of the BLA (June 1, 2007) were eligible to participate in lifetime retiree healthcare.

- Pension Plan. The Final Offer adopted the existing BLA pension language. Under the terms of the 2011 extension agreement between the parties, employees hired on or after July 1, 2011 were no longer eligible to participate in the pension plan. (GC. 11)

- 401(k) Plan. ASARCO would match 100% of employee contributions up to 7% of pay for workers hired on or after July 1, 2011. All employees would be automatically enrolled into the plan with a 3% default deferral, and could contribute up to 75% of their pay into the plan. Under the existing BLA, as modified in 2011, ASARCO matched 100% of employee contributions up to 6% of pay for employees hired on or after July 1, 2011. (GC. 11)

- Healthcare. Employee premiums for health insurance under the Final Offer were $50/month for single coverage; $120/month for single plus one dependent; and $140/month for family coverage. Under the modified BLA, employees paid $11.42/month for single coverage; $23.92/month for single plus one dependent; and $37.67/month for family coverage.

- Wages and Singing Bonus. Under the Final Offer, there would be no change in the wage rates or shift differentials set forth in the existing BLA. ASARCO offered employees a $1,000 bonus upon ratification, and an additional $1,000 upon the first year and second year anniversary of the agreement.

- Successorship. Prospective buyers would be required to accept and assume all obligations set forth in the agreement. Under the BLA, a buyer needed to enter into a collective-bargaining agreement with the Union as of the sale closing date.

- Extended Shifts. The company could implement alternate work schedules/extended shifts at its sole discretion, and determine unilaterally when they were no longer needed. Under the BLA, the Union had to agree to extended shifts and could cancel extended shift schedules with 60 days' notice.

Notwithstanding the Final Offer, the Union submitted another package proposal on June 5, 2015, agreeing to certain concessions, including withdrawing its shift differential proposal and signing bonus, if the company agreed to the Union's proposals on the copper price bonus, successorship, 401(k) plan, post June 30, 2011 hires, retiree healthcare, and if the company withdrew its retired employee life insurance proposal. On the same date, both parties gave each other a 15-day written notice to terminate the BLA. Therefore, as of June 30, 2015, the BLA – which had been in place for over eight years – expired. (GC. 15-17)

On October 29, 2015, Respondent sent a letter to the Union declaring that the parties were at impasse, and informing the Union the company planned to implement the Final Offer effective December 1, 2015. On November 2, 2015, the Union replied, disagreeing that the parties were at impasse, and saying that the Union would have a new proposal ready for their next scheduled meeting. (GC. 20, 74)

Respondent replied, via letter dated November 3, welcoming any new contract offer, but stating that, if such proposals were anything less than accepting the Final Offer, then the parties remained at impasse. The Union answered by letter on November 4, asserting that the company's claim of impasse was "absurd," and explaining the Union's belief to the contrary. The Union expressed its availability to meet on December 14, and asked ASARCO for available bargaining dates. In the November 4 letter, the Union also reiterated and clarified some of its previous information requests, including information on: the copper price bonus; retiree healthcare; reimbursement rates; and contracting out. (GC. 75, 76)

On November 6, 2015, ASARCO issued an open letter to employees informing them that the company planned to implement its Final Offer effective December 1, 2015, and highlighting the terms of the Final Offer. Respondent implemented its Final Offer on December 1, 2015. (GC. 22; Tr. 155-56)

The parties again met on December 14, and the Union submitted another package of proposals agreeing to make various concessions, including dropping its proposal on shift differential and signing bonus, if the company accepted the Union's proposals for a wage increase ($1.50/hour upon ratification and $1.40/hour each year thereafter); copper price bonus; successorship; post June 30, 2011 hires; and retiree healthcare. This was contingent on the company withdrawing its proposal on retired employee life insurance. ASARCO replied, on December 23, rejecting the proposal, and stating the parties were still at impasse. The Union replied the same date strongly disagreeing, noting that it has continued to negotiate and make

counter offers to the company, and has stated at the bargaining table it has further movement in an attempt to reach an agreement. (GC. 24-26)

On December 29, Respondent sent a letter to the Union asking if it was willing to accept ASARCO's Final Offer. The Union replied the next day again insisting the parties were not at impasse and stating the Union was looking forward to their scheduled meeting on January 20, 2016. The parties bickered as to the necessity of a "big table" meeting on January 20, and Respondent did not appear at the meeting. The last "big table" bargaining session was on December 14 meeting. (GC. 28-32; Tr. 1469)

It is against this backdrop that the unfair labor practices alleged herein by the General Counsel have unfolded.

V. Individual Allegations

A. Alleged 8(a)(1) Violations

1. Respondent's Handbook Rules / Policies

In November 2015, ASARCO held several employee training meetings where Respondent's Code of Conduct and Conflict of Interest policies, dated May 2014, were distributed. The evidence shows that versions of both policies had been distributed to employees as early as 2013. (GC. 85; Tr. 479, 687-89) Paragraph 5(e) of the Consolidated Complaint alleges that the following provisions contained in these policies violate Section 8(a)(1) the Act:[8]

> CODE OF CONDUCT POLICY
>
> Conflicts of Interest [R. 43, p.6]
>
> Employees have a duty to avoid possible conflicts of interest. For example, if a situation arises where the personal interest of an employee or an affiliated party conflicts with the interests of ASARCO, or an employee uses his or her position to achieve personal gain, a conflict of interest may exist. Each ASARCO employee must avoid at all times any interest that might conflict or appear to conflict with the interest of the company or that might deprive the company of the undivided loyalty of the employee in business dealings.
>
> * * *

[8] Paragraph 7(s) of the Consolidated Complaint alleges that Respondent unilaterally implemented both policies at the Silver Bell Mine on November 3, 2015, without bargaining with the Union. However, the evidence shows that versions of both policies were in effect as early as January 2013, and employees consistently acknowledged receiving both policies in 2013, 2014, and 2015. (GC. 87) The first 8(a)(5) charge was not filed until August 17, 2015. (GC. 1(e)) And the General Counsel has not shown that the policies distributed to employees on November 3, 2015 were any different than the existing policies that employees had previously acknowledged receiving in 2013 and 2014. As such, the allegation in paragraph 7(s) of the Consolidated Complaint is dismissed as it is barred by the 6-month statute of limitation set forth in Section 10(b) of the Act.

All employees have a duty to report to Human Resources, the Legal Department or through the Ethics and Compliance Hotline any personal, property, or business interests or obligations that might conflict or appear to conflict with the interests of ASARCO. Employees should take care to report conflicts to a person who they believe is not involved in the matter giving rise to the conflict.

Disclosure [R. 43, p.10]

ASARCO will ensure that material communications to the public about the company and in all required filings to governmental authorities (i) are full, fair, timely, factual, accurate and understandable; (ii) are disseminated in a way that provides broad, non-exclusionary distribution of the information to the public, and (iii) meet all legal requirements. Only authorized personnel, namely, the COO, the CFO and Vice President of Environmental Affairs are authorized to respond on behalf of the company to inquiries on material matters for members of the investment community and the media. Company employees who are not authorized spokespersons may not respond to inquiries or discuss matters related to the company with representatives of the investment community or the media, and should refrain from discussing company matters with anyone outside the company except in the ordinary course of business as required in the performance of his or her company duties. Moreover, except as authorized or permitted by applicable law, no employee should disclose non-public information outside of the company in the absence of appropriate confidentiality agreements.

Information Systems [R. 43, p.11]

Information system resources and their contents are assets of ASARCO and must be protected from unauthorized access, modification, destruction or disclosure. Altering or modifying information except as it relates to an employee's required job function(s) is not allowed. Additionally, any attempt to gain access to information, user ID's, facilities or other information to which such person is not specifically authorized is prohibited.

Data processing facilities or corporate information resources should not be used in a manner that is inconsistent with the business of ASARCO except for minimal, incidental use that is not specifically disallowed by this Code of Conduct.

Additionally, information systems should not be used for outside business ventures, charitable organizations or for any political or religious purpose, without prior written authorization by the Chief Operating Officer. Other examples of prohibited use are:

* * *

- Solicitation, except for company sanctioned activities approved by the COO

* * *

- Personal gain activities
- Obscene, pornographic, harassing or abusive material

* * *

- Forwarding of mass e-mail or chain letters.

(4) E-Mail, Internet and Voice Mail Usage [GC. 43, p. 11-12]

When an employee uses an ASARCO e-mail or instant messaging account, or visits a Web site on the Internet at work, he or she is in effect representing ASARCO to the world. Employees may not use these tools at work for personal gain or for unlawful or unethical purposes. Employees are expected to use e-mail and the Internet responsibly and to limit personal use of these tools in the workplace so that it will not affect job performance or the success of the company. ASARCO does monitor employee usage of e-mail and the Internet.

Employees should also note that all e-mail and voice mail is the property of ASARCO, regardless of content. E-mail and voice mail should be treated as other verbal or written business communications. Appropriate language and standards of decency must be used. Offensive, demeaning, defamatory or disruptive messages are prohibited. System users are responsible for the content of all text, audio and video sent using the Internet or e-mail. All messages must comply with relevant federal and state laws regarding copyright, trademark and intellectual property.

CONFLICT OF INTEREST POLICY

L. Employment [R. 44, p. 6-7]

(a) Employment by, or rendering consulting services to any outside concern which does or may do business with, or is competitor of the Company, except as a representative of the Company or with its written consent, is prohibited.

(b) Employees shall not engage in outside business activities or employment incompatible with the Company's right to such employee's full time and dedicated service.

(c) Employment decisions are to be made solely in the best interests of the Company. An offer of employment or promotion for any position within the Company or its subsidiaries shall be based exclusively on the requirements of the position being filled and the qualifications of the candidates with due regard for applicable local, state and federal employment law. Family or personal relationships with current or retired employees shall not inappropriately influence decisions.

U. Fundraising/Solicitation [R. 44, p. 9]

> The Company encourages employees to support their community and be good citizens. The Company recognizes that individuals will sometimes seek to fundraise or solicit on behalf of worthy causes; however, activities such as these can create conflicts of interest, or undue pressure to conform or participate. In order to avoid any appearance of a conflict of interest, employees should consult with their local HR manager or General Counsel and obtain approval prior to engaging in such activities.
>
> V. Questions Regarding Policy and Reporting of Violations [GC. 44, p. 9]
> It is an employee's primary duty to represent the Company at all times to the best of his or her ability. Therefore, no employee should become involved in any situations, in addition to those set forth above, which would impair or interfere with this primary duty. While it is the responsibility of each individual employee to recognize such situations, should he or she be in doubt as to any particular set of facts which might be deemed a conflict of interest, the question should be submitted in writing or e-mail to his or her local HR manager and/or the General Counsel.
>
> It is the duty of the employee to follow the advice received on any possible conflict, keeping in mind that the procedures and guidelines set forth in this Policy Statement have been formulated to afford the maximum protection to the employee as well as to the Company.

a. Legal Framework

A Section 8(a)(1) violation occurs when an employer maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights.[9] *T-Mobile USA, Inc.,* 363 NLRB No. 171, slip. op. at 1, (2016) (citing *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999)). If the allegedly unlawful rule explicitly restricts Section 7 activity, then its maintenance is unlawful; if not, then the rule will still be deemed a violation if: "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. (quoting *Lutheran Heritage Village-Livonia*, 343 NLRB 646-647 (2004)).

The rules at issue here do not alleged explicitly restrict protected activities and have not been promulgated in response to, or applied to restrict, protected activities. Therefore, the relevant inquiry is whether employees would reasonably construe the challenged rules to prohibit Section 7 activity. A "reasonable reading," must be given to the rules, they must not be considered in isolation, and not be presumed to improperly interfere with employee rights. *Lutheran Heritage Village*, 346 NLRB at 346. That being said, any ambiguities in the rules are to be construed against the drafter. *Lafayette Park*, 326 NLRB at 825.

b. Analysis of policy handbook allegations

[9] This is true even if the rule was promulgated outside the 10(b) period and has not been enforced. *Ivy Steel & Wire, Inc.,* 346 NLRB 404, 422 (2006).

i. Conflict of Interest

Regarding the conflict of interest policy, I agree with the General Counsel and the Union that, under current Board precedent, the rule is overly broad. Here, the prohibition applies to "any interest that might conflict or appear to conflict with the interests of the company," which is amorphously broad. *Schwan's Home Service, Inc.*, 364 NLRB No. 20, slip op. at 5 (2016) (conflict of interest rule prohibiting any conduct detrimental to the best interest of the company or its employees a violation). One example specifically provided by the rule, situations where an employee's interest may conflict with the interest of ASARCO, could reasonably be read to include a strike, "informational picketing, or public expressions of workplace dissatisfaction." *First Transit, Inc.*, 360 NLRB 619, 630 (2014). Respondent could have narrowly drafted this rule to legitimately prohibit "uncooperative, improper, unlawful, or otherwise unprotected employee misconduct," but did not do so. Id. at 619 fn. 5 (collecting cases and distinguishing illegal rule which prohibited participating "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," from those situations where rules legitimately restrict improper employee conduct). Accordingly, Respondent has violated Section 8(a)(1) of the Act by maintaining an overbroad conflict of interest policy.

ii. Disclosure

This rule is poorly drafted and is overly broad; when read in context employees would reasonably construe the language to prohibit Section 7 activity. The rule prohibits employees from: (a) "responding to inquiries . . . with representatives . . . of the media;" (b) "discussing company matters with anyone outside the company except in the ordinary course of business as required in the performance" of their duties, and disclosing "non-public information outside of the company in the absence of appropriate confidentiality agreements." The problem for Respondent, is that employees have the right under Section 7 to do all these things.

Employees have the right to communicate directly with the news media about their working conditions. *Gunderson Rail Services, LLC.*, 364 NLRB No. 30, slip op. at 46-47 (2016) (rule stating that employees, other than those designated by the company, should refrain from communicating with the media a violation); *Trump Marina Associates, LLC, v. NLRB*, 435 Fed.Appx. 1, 1 (DC. Cir. 2011) (rule prohibiting employees from "releasing statements to the media without prior permission" and limiting "employees authorized to speak with the media" a violation). Employees also have the right to discuss their working conditions with non-employees, or people "outside the company," such as union representatives. *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1131 (2012), enfd. 746 F.3d 205 (5th Cir. 2014). And rules prohibiting such conduct violate the Act. Id. (rule prohibiting disclosure of "personnel information and documents" to persons "outside the organization" a violation); See also *Bigg's Foods*, 347 NLRB 425, 425 n.4 (2006) (rule prohibiting employees from discussing their own or their coworkers' salaries with anyone "outside the company" a violation). Respondent's prohibition on discussing "company matters" with anyone outside the company, unless done in performance of their job duties, also constitutes a violation. *First Transit, Inc.*, 360 NLRB 619, 628 (2014) (rule prohibiting disclosure of "any company information for any purpose other than to perform job duties or further company-sponsored activities without written authorization" a violation). So

too does Respondent's ban on discussing "non-public" information outside the company. *Hilton's Environmental, Inc.*, 320 NLRB 437 fn. 2, 454 (1995) (employer's ban on discussing job-related matters outside the company's facility violated Section 8(a)(1)); *T-Mobile USA, Inc.* 363 NLRB No. 171, slip op. at 2, 23 (2016) (provision covering all non-public information includes information employees would want to share with their union representatives regarding wages, benefits, and terms of employment).

While ASARCO may have some interest to protect regarding its disclosure rule, a "more narrowly tailored rule that does not interfere with protected employee activity would be sufficient to accomplish the Company's presumed interest." *Cintas Corp. v. NLRB*, 482 F.3d 463, 470 (D.C. Cir. 2007). As set forth above, by maintaining an overly broad disclosure rule Respondent violated Section 8(a)(1) of the Act.

iii. Information Systems

Employees have a presumptive right to use their employer's email systems during nonworking time for communications protected by Section 7. *Purple Communications*, 361 NLRB No. 126, slip op. at 1 (2014). This right includes union or other related and protected solicitations. *UPMC*, 362 NLRB No. 191, slip op. at 3 (2015). An employer can rebut that presumption by demonstrating "special circumstances" necessary to maintain production or discipline justifying the restriction of these rights. Id.

Here, Respondent's policy prohibits unapproved employee solicitations and the forwarding of mass e-mails or chain letters. However, ASARCO has failed to demonstrate any special circumstances rebutting the right of employees to use the company's information systems to engage in protected Section 7 conduct. As such, Respondent's prohibition on solicitation violates the Act, as does the prohibition on mass e-mail.[10] *Verizon Wireless*, 365 NLRB No. 38, slip op. at 1, fn. 3 (2017) (prohibition against "unauthorized mass distributions" a violation); *UPMC*, 362 NLRB No. 191, slip op. at 3-5, (rule prohibiting employees from using company's electronic messaging system to engage in solicitation a violation).

The General Counsel also asserts that employees would read the rule's prohibition on "personal gain activities" as barring them from trying to improve their working conditions. I disagree. Reading the rule in context, this portion prohibits workers from using ASARCO's information system for personal, monetary gain that is unrelated to work.

Similarly, the General Counsel asserts that the prohibition on "obscene, pornographic, harassing or abusive material," constitutes a violation. In so doing, the government reads the words "obscene" and "pornographic" out of the rule, focusing instead on the prohibition against "harassing" and "abusive material." Again, I disagree with the government. Section 7 of the Act does not protect "pornographic" or similarly obscene, abusive, or harassing material. Reading the rule in context, it is designed to prohibit harassing and abusive material such as pornography or related obscenities – not Section 7 activity.

[10] The prohibition against "chain letters" is not a violation, as employees would not reasonably read that term to encompass protected communications. *Verizon Wireless*, 365 NLRB No. 38, slip op. at 1, fn. 3 (2017).

iv. E-Mail, Internet, and Voice Mail Usage

The General Counsel objects to Respondent's prohibition in this rule regarding "personal gain," arguing employees would read the rule to bar computer system use for anything that would inure to the employees' personal gain, including Section 7 activities aimed at improving working conditions. I find this prohibition extends to using the email system for personal, pecuniary gain, that is unrelated to work or to employee working conditions.

The General Counsel also argues that the portion of the rule limiting personal use so as to not affect "the success of the company," is illegal – arguing employees would understand the rule to bar protected conduct. I disagree. Reading the entire rule in context, it does not infringe upon Section 7 activity, but asks employees to limit personal use so as to not affect the performance of their job duties, which affects the company's overall success.

The General Counsel next argues that the rule is improper, in that it prohibits "offensive, demeaning, defamatory or disruptive messages," citing *UPMC*, 362 NLRB No. 191 (2015). In *UPMC*, the Board affirmed the judge who found that the company's policy prohibiting non-work email use that "may be disruptive, offensive, to others or harmful to morale," to be a violation, as the policies swept "broadly and ambiguously." Id. slip op at 1-2 fn. 5, 21. I agree with the General Counsel with respect to ASARCO's prohibition on "offensive," or "disruptive," messages. Those terms "sweep broadly and ambiguously," and Respondent has provided no illustrations or guidance to assist workers in interpreting these terms. *Cf. Tradesmen International*, 338 NLRB 460, 461 (2002) (the fact employer gave examples of prohibited conduct, such as illegal acts and restraint of trade, supports a finding that prohibition on "disloyal, disruptive, or damaging" conduct is lawful). As such, to the extent Respondent's email policy prohibits offensive or disruptive messages, the policy violates Section 8(a)(1).

v. Employment

The General Counsel argues that the following portions of Respondent's employment rule constitute a violation:

- Employment by, or rendering consulting services to any outside concern which does or may do business with, or is competitor of the Company;

- Employees shall not engage in outside business activities or employment incompatible with the Company's right to such employee's full time and dedicated service;

- Employment decisions are to be made solely in the best interests of the Company.

GC. Br., at 39. The General Counsel argues that reasonable employees would view that portion of Respondent's employment rule prohibiting "employees from 'employment' or 'consulting services' to any 'outside concern' which may be a competitor of Respondent," as restricting workers' ability to engage in outside activities concerning unions, labor organizations, or other outside concerns engaging in activism for better wages" or working conditions. Id. And that the rule's restriction on consulting services with Respondent's "competitors" is vague and "likely to

confuse employees as to what groups they could or could not support or share common cause." Id. However, it is the government's reading of the rule that is confused. The rule simply restricts employees from working with ASARCO's competitors – either directly or as consultants – without the company's written approval. I can think of no labor organization, or advocacy group, that is actively in the business of mining/refining copper – and thus a competitor to ASARCO – and the General Counsel points to no such example. As such, the General Counsel's allegation regarding this portion of Respondent's Employment rule is dismissed.

The General Counsel also asserts that the portion of the rule prohibiting employees from engaging in outside business activities or employment that is incompatible with ASARCO's right to the employee's full time and dedicated service would "convince employees that union activity was discouraged" because it would "mean taking an incompatible position with Respondent or otherwise subverting Respondent's business interests." *GC. Br.*, at 39. I do not believe there is anything in the cited language that employees would reasonably consider to impede their abilities to engage in protected conduct and the General Counsel's allegation regarding this portion of the rule is also dismissed.

Finally, the government objects to the portion of the rule that says "[e]mployment decisions are to be made solely in the best interest of the company." Although the General Counsel cites no specific precedent supporting its claim, in *Schwan's Home Service,* 364 NLRB No. 20, slip op. at 5 (2016), the Board found a rule prohibiting "[c]onduct on or off duty which is detrimental to the best interests of the company or its employees," to be a violation. However, in *Schwan's* the invalid rule was a separate clause aimed at misconduct – not just one sentence cut from a larger clause – such as here. Indeed, in finding a violation, the Board in *Schwan's* stated that, "[b]eyond the amorphous reference to 'best interest,' [the rule] contains no examples of conduct it prohibits, or language which would confine its reach to misconduct unrelated to Section 7 activity." Id. Here, the sentence in question is part of a larger paragraph discussing Respondent's hiring decisions which are based upon candidate qualifications and disavowing nepotism. The rule here contains the precise explanation that the rule in *Schawn's* lacks. Accordingly, given a reasonable reading of the rule, there is no fear that employees would construe the rule to prohibit Section 7 Activity.

vi. Fundraising/Solicitation

Respondent's fundraising/solicitation rule requires employees to "consult their local HR manager or General Counsel and obtain approval prior to engaging" in fundraising or solicitation on behalf of worthy causes. Employees have a right to solicit their coworkers in both work areas and non-work areas during non-work time, absent special circumstances. *Ivy Steel & Wire, Inc.*, 346 NLRB 404, 422 (2006) (citing *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615 (1962). A rule requiring employees to obtain their employer's approval prior to engaging in protected solicitation is a violation. Id. (citing *Saginaw Control & Engineering, Inc.*, 339 NLRB 541 (2003). Here, ASARCO's solicitation rule is not limited to working time. As such, the rule is overly broad and a violation of Section 8(a)(1) of the Act.

vii. Questions Regarding Policy and Reporting Violations

The General Counsel argues that the portion of ASRCO's rule stating it is "an employee's primary duty to represent the Company at all times to the best of his or her ability," coupled with the directive that employees should not become involved in ay situations which "which would impair or interfere with this primary duty" is overly broad and a violation. *GC. Br.*, at 41. Respondent's rule is meant as a catch-all regarding conflicts of interest, and precludes employees from becoming "involved in any situations . . . which would impair or interfere with" their "primary duty" of "represent[ing] the Company at all times to the best of his or her ability."

I believe this rule suffers from the same deficiencies as the off duty conduct rule in *Schwan's*. It applies to *any situation* that would interfere with what ASARCO asserts is the primary duty of employees to represent the Company at all times. The rule is surely vague, nebulous, and contains no examples of *situations* that should be avoided; would employees on strike against the ASARCO be guilty of failing to "represent the Company at all times." In these circumstances a reasonable employee would consider a strike against ASARCO, or criticizing the labor policies of the company, a violation of their duty and a situation that should be avoided under this rule. Therefore the rule violates Section 8(a)(1) of the Act. *Schwan's Home Service*, 364 NLRB No. 20, slip op at 5 (citing *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2 fn. 5 (2014) (unlawful rule prohibited participation "in outside activities that are detrimental to the company's image or reputation, or where a conflict of interest exists," or "conducting oneself during nonworking hours in such a manner that the conduct would be detrimental to the interest or reputation of the Company")).

2. Alleged March 5, 2015 interrogation at the Mission Complex

Mario Padilla ("Padilla") works at the Mission Complex – south mill as an operator, and is a member of Teamsters Local 104. Padilla's job includes taking water readings at the tailings pond. In March 2015, Padilla's direct supervisor was Tony Hotchkiss ("Hotchkiss") who was responsible for production work from the crusher to the tailings pond. At the south mill the chief operations supervisor is Ronnie Ventura ("Ventura"); he also holds the title of tailings supervisor. (Tr. 623-26, 1856-57; 1876-78)

On March 5, 2015, Padilla was working the morning shift; there had been a Union meeting the day before. Padilla needed to drive to the #4 tailings dam and take a water measurement to ensure there was sufficient water for the day's operations. To take the measurement, Padilla had to row a small boat onto the tailings pond to reach the #4 tower. He therefore needed a spotter; a spotter is used whenever someone is rowing out to the tower in the event of an accident. That day Hotchkiss served as Padilla's spotter. At about 9:30 a.m. the pair drove to the #4 tailings pond. As they were driving, Hotchkiss asked Padilla how their union meeting went. Padilla answered that it went fine. Hotchkiss then asked Padilla if he was going to strike and whether he knew when the Union was going to strike. Padilla replied that he was not sure. The pair then started talking about Padilla's duties for the day; the ride lasted about 10 minutes. (Tr. 624-29; 1883-84; 1860, 1863; R.5 p.29)

When they arrived at the #4 tailings dam, Padilla prepared the rowboat and started rowing to the #4 tower. While he was rowing, he noticed that Ventura had arrived. Padilla took his water measurement, and rowed back to shore where Ventura was standing with Hotchkiss.

Padilla joined them, and then either Ventura or Hotchkiss asked Padilla if he was going to strike, and if he knew when the strike would occur. Padilla replied that he would probably go on strike. He was then asked if any of the other operators would strike. Padilla replied that he knew some operators would cross the picket line, but most Union members would probably go on strike.[11] The three then started talking about Padilla's duties for that day. At no time did either Hotchkiss or Ventura tell Padilla why they wanted to know about strike plans, or that they needed the information for staffing purposes; nor did they give Padilla assurances that the information elicited would not result in reprisals. (Tr. 629-633)

a. Analysis

In determining whether a supervisor violates the Act by questioning employees about their intentions to strike, the Board looks at the totality of the circumstances. *Mosher Steel Company*, 220 NLRB 336 (1975), enfd. 532 F.2d 1374 (Table) (5th Cir. 1976); *Rossmore House*, 269 NLRB 1176 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). As the Board noted in *Mosher Steel*:

> questions about employee strike intentions are not *per* se unlawful but must be judged in light of all the relevant circumstances. Thus, where the record shows that at the time the questions were asked the Employer had a reasonable basis to fear an imminent strike and merely sought to ascertain the chances for keeping his business open, such inquiries are lawful. On the other hand, an employer cannot rely on unsubstantiated rumor or mere speculation as a justification for questioning employees concerning their intentions in the event a strike is called.

In sum, "[i]nterrogation of employees as to what they would do in the event of a strike, especially when asked in the absence of any actual strike threat, is coercive and violates Section 8(a)(1) of the Act." *York Div., Borg-Warner Corp.*, 229 NLRB 1149, 1150 (1977). This is especially true where no assurances against reprisals are given before the questioning. Id.

Here, there is no evidence that the Union was actually planning a strike at the time, and Ventura denied that there were any rumors of strikes in March 2015.[12] Moreover, no lawful purposes have been shown regarding Padilla's questioning. Accordingly, I find that Respondent's questions to Padilla about the Union and its intention to strike, and whether he or any of his coworkers would cross the picket line, was coercive and violated Section 8(a)(1) of the Act. *York Div. Borg-Warner Corp.*, 229 NLRB at 1150.

3. Alleged June 24, 2015 interrogation at Hayden

In June 2015, Jeremy Garcia ("Garcia") was working as a filter plant operator at Hayden. Garcia is a member of the Steelworkers and has worked at ASARCO for just over seven years. On June 4, 2015, Garcia was working the graveyard shift in the filter plant control room.

[11] Hotchkiss and Ventura denied asking Padilla about the union meeting, or anything about a strike. Indeed, Hotchkiss denied serving as a spotter for Padilla, and Ventura denied being at the #4 tailings pond with Hotchkiss. (Tr. 1863-65; 1884-86) Based on demeanor, I credit Padilla's testimony as to what occurred that day.
[12] See Tr. 1407, 1891.

Around 5:00 a.m. his supervisor John Machado ("Machado") walked in and asked him about operations. Machado oversees six employees at the crusher and two employees at the filter plant, including Garcia. (Tr.856-61, 1893-1900)

After discussing the previous night's operations, Machado inquired about the Union meeting scheduled later that day, asking if Garcia knew the time of the meeting as several workers were asking about it. He then asked Garcia if he thought there was going to be a strike vote at the meeting. Garcia replied that he did not believe so, because a strike vote meeting would have been better publicized. Machado then told Garcia that he did not think the Union "had the balls to go on strike." Machado asked Garcia if he would picket if a strike occurred or whether he would work elsewhere. Garcia said that he would work somewhere else if he needed to, but that he would not cross the picket line. Machado told Garcia that he had heard from other management officials that if a strike occurred they would close the Hayden operations. (Tr. 862)

Machado then asked Garcia if he knew how negotiations were progressing. Garcia said that things were going "real slow" with negotiations and hopefully it would not come to the point of a strike. Machado replied that he was at ASARCO during the last strike and workers received better wages and benefits as a result of the strike. Garcia replied saying that, when the workers get better wages and benefits, it gives more leverage for salaried employees to negotiate better salaries and benefits. Machado said that he understood, but as a member of management he had to side with the company. Machado then asked whether there was going to be enough support for a strike. Garcia replied saying he hoped people would realize they needed to do whatever was necessary for better working conditions. Machado again said he didn't think the Union had the "balls" to go on strike. He also told Garcia about a conversation he had with a couple employees who said they would cross the picket line if there was a strike.[13] The pair then started talking about work and operations at the plant. After the conversation, Garcia told two coworkers what Machado told him about the Hayden plant closing if there was a strike. (Tr. 863-65)

Later that morning, Garcia went to the Union meeting, which was open to all unions and crafts working at any ASARCO property. It was an informational meeting with updates on negotiations and related items; no strike vote occurred. When the meeting was opened for questions, Garcia stated that he had a conversation with a supervisor who had brought up the subject of going on strike. The Union's lawyer was at the meeting, and Garcia was referred to her regarding his interaction with Machado. (Tr. 867-71)

a. Analysis

i. Threat of Plant Closure

[13] Machado admits that he was working that day, and that he had a conversation with Garcia. However, Machado testified that he only asked Garcia about his shift, and whether he had any concerns or work orders. (Tr. 1900-01) Considering the demeanor of the two witnesses, I credit Garcia's testimony as to what happened. That Garcia was a current employee at the time of the hearing, and testifying against his pecuniary interest, also supports his credibility. *Flexsteel Industries*, 316 NLRB 745, 745 (1995).

While discussing the Union, the possibility of a strike, and the progress of negotiations, Machado told Garcia he had heard from other management officials that if a strike occurred they would close the Hayden operations. The Union and the General Counsel assert that Machado's statement constitutes an illegal threat, while Respondent claims that it is was simply an expression of Machado's personal opinion, protected by Section 8(c) of the Act.[14]

I agree with the General Counsel and the Union that Machado's statement constitutes an illegal threat. It is well established that an employer violates Section 8(a)(1) of the Act if it threatens to close a plant or institute layoffs because of employee union activity. *NLRB v. Nueva Engineering Inc.*, 761 F.2d 961, 966 (4th Cir. 1985) (citing *NLRB v. Gissell Packing Co.*, 395 U.S. 575 (1969)). In *Gissell*, the employer warned workers that it was in a "precarious financial condition," that the union would have to strike to achieve its demands and that the probable result of a strike would be a plant shutdown. Id. at 587-89. The Supreme Court affirmed the finding that such statements constitute unlawful threats of plant closure as they were not "carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control." Id. at 618. Here, Machado's statement about Hayden closing in the event of a strike was not carefully phrased and was not capable of proof based on objective fact. Id. at 618-19 ("conveyance of the employer's belief, even though sincere, that unionization will or may result in the closing of the plant is not a statement of fact unless, which is most improbable, the eventuality of closing is capable of proof") (internal quotation omitted).

The fact that Machado may have been a lower-level supervisor is of no consequence here, and doesn't make his statement any less coercive. *General Electric Co.*, 321 NLRB 662, 662, 669 (1996) (low-level supervisor telling employee that if the Union won, the "company could close the plant and do away with the 12-hour days within two weeks"), enfd. in relevant part 117 F.3d 627, 634 (D.C. Cir. 1997). Finally, as to Respondent's claim that Machado's comments were protected, Machado did not present his remarks as his own personal opinion, but instead attributed them to other management officials. Thus he was speaking as "a member of management, who was in a position to hear higher management's expressed intentions," and his comments were outside the protection of Section 8(c). Id. Machado's statement therefore constituted an illegal threat in violation of Section 8(a)(1) of the Act.[15]

ii. Interrogation

I also find Machado's questions to Garcia about support for a strike and whether Garcia would actively picket constitute unlawful interrogation. Questioning an employee concerning the strike plans of his coworkers is unlawful because it puts the employee "into the unsolicited role of informant on union plans." *Tony Silva Painting Co., Inc.*, 322 NLRB 989 fn.1 (1997). It is especially coercive when it is accompanied by other threats. See *NLRB v. Brookwood*

[14] Under Section 8(c), an employer is free to communicate to his employees a statement of opinion about the union as well as to predict the precise effect that unionization may have on the company so long as it does not contain a "threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

[15] Although Machado's statements were only alleged in the Consolidated Complaint as an unlawful interrogation, the Board may find a violation and remedy if the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Hi-Tech Cable Corp.*, 318 NLRB 280, 280 (1995). Such is the case here. Not only was the threat allegation fully litigated at the hearing, it was also briefed by the Respondent. See *Resp't Br.*, at 19-21.

Furniture, 701 F.2d 452, 462-63 (5th Cir.1983) (finding an interrogation coercive where it was combined with the threat of reprisal). Here, while he was asking Garcia about strike plans, Machado also conveyed that the Hayden crusher would close in the event of a strike.

Also, it is significant that, when asking Garcia whether he would actively picket during a strike, Machado never explained the purpose of his inquiry or give Garcia assurances against reprisals. As such, considering the totality of the circumstances, Respondent coercively interrogated Garcia in violation of Section 8(a)(1) of the Act. *Fairpene Industries Products*., 292 NLRB 797, 797 (1989), enfd. 880 F.2d 1318 (2d Cir.1989), cert. denied, 493 U.S. 1019 (1990); *NLRB v. Camco, Inc.*, 340 F.2d 803, 807 (5th Cir. 1965) ("Questioning is much more likely to have a coercive effect if the purpose of the interrogation is not explained and if there are no assurances against retaliation.").

4. Alleged June 25, 2015 interrogation at the Mission Complex

Cliff Stephens ("Stephens") works as mill operator at the Mission mine, south mill. He is a member of Teamsters Local 104 and serves a union steward. On June 25, 2015, Stephens was working the day shift, monitoring haul trucks from the crusher control room. Hotchkiss was his supervisor and was with him in the control room that morning. Hotchkiss struck up a conversation with Stephens, eventually asking him how the Union meeting went a few days earlier. Stephens replied that things had gotten a little out of control, as a worker who had previously relinquished his membership in the union appeared, started asking questions, and was removed from the meeting. Hotchkiss then asked if things were really that bad, and Stephens replied "obviously they are." Hotchkiss then asked whether, in the event of a strike, Stephens planned on striking or crossing the picket line. Stephens told him that he was going to "fucking strike." Hotchkiss then asked Stephens whether he could afford to strike, and Stephens replied that he could, and that he would also get a strike benefit. Hotchkiss then asked whether he knew what was being negotiated at the bargaining table, and Stephens replied that he was not privy to that information. Hotchkiss told Stephens it was his understanding that the company was willing to pay the copper price bonus going forward to new hires, but not what was owed in the past.[16] Stephens replied that this was also his understanding. Hotchkiss testified that, while he was working on June 25, he could not recall if he spoke to Stephens that day. However, he was emphatic that he never spoke to Stephens about a potential strike, crossing the picket line, or union activities.[17] (Tr.636- 44, 867-68)

No evidence was presented that the Union was planning a strike or a strike vote in June 2015. And, Respondent has presented no lawful purposes for Hotchkiss' questions. Thus, I find that Respondent's questioning of Stephens was coercive and violated Section 8(a)(1) of the Act. *York Div. Borg-Warner Corp.*, 229 NLRB at 1150.

[16] The parties have been litigating an arbitration award which found that, under the 2011 MOU, the copper price bonus was payable to all employees, even those who were hired after July 1, 2011 and were not eligible to participate in the pension plan. See *ASARCO, LLC v. United Steel Workers*, 2016 WL 826762 (D. Ariz. 2016).

[17] Based upon demeanor, I credit Stephens' testimony as to what occurred. While Hotchkiss could not recall if he spoke to Stephens on June 25, he nonetheless testified that he did not speak with Stephens "that day" about a potential strike, crossing the picket line, or about union activities; his denials are simply not believable. (Tr. 1867-68) Clearly Hotchkiss was curious about which of his workers would cross the picket line in the event of a strike and was trying to gage their loyalty to the Union by asking them.

5. 8(a)(1) allegations involving meetings with Chad Hymas

In October 2015, ASARCO held a series of mandatory employee meetings at the Ray mine featuring motivational speaker Chad Hymas ("Hymas"). Fifteen different one-hour sessions were scheduled over three days: October 26, 27, and 28.[18] Hymas had spoken with Ray mine employees in the past, primarily about safety. (Tr. 724-25; GC. 88-90)

Before Hymas spoke with employees in October 2015 he met with Mike Kotraba (Kotraba), the Ray mine general manager for operations. Kotraba prepared with Hymas, discussing with him the goals for his meetings and informing Hymas as to what was occurring at the mine. According to Kotraba, the price of copper was terrible, the company had been through layoffs, the Union contract was unsettled, and the company was concerned about people being distracted. Kotraba discussed all these issues with Hymas who knew that Respondent was looking to become more efficient regarding employee scheduling, and the other steps the company was trying to take to save money. (Tr. 708, 725-26, 730-31; GC 4; R. 3)

It is in this context that two Ray workers, Robert Aguilar ("Aguilar") and Carl Monize ("Monize"), testified about their meeting with Hymas. Both were working the overnight shift (11:00 p.m. to 7:00 a.m.) at the Ray mine complex on October 27 when they were summoned to a mandatory motivational meeting with Hymas in the pit-office conference room. Announcements were made by the dispatcher, via radio and the dispatch panels in Respondent's trucks, summoning employees to the meeting.[19] As employees arrived for the meeting, pit foreman Button DuBois ("DuBois") was standing outside the office with an employee sign-in sheet. The entire crew, about 20 employees, were at the meeting. (Tr. 921-25; 937-45, 956-61)

Monize sat near the front and started speaking with Hymas who asked if he should start or wait for a supervisor. Monize went to DuBoise's office and asked. DuBois told him that Hymas "had the floor" and could start. Monize relayed the information to Hymas, who started the meeting by showing a video about his kids. Eventually Hymas spoke about ASARCO, saying the price of copper was down and the company was in a tight spot, needing to cut costs. He told the group that one way to cut costs was for workers to go on 12-hour shifts and said employees were in a position where they could face another layoff. Hymas asked the workers to raise their hands if they wanted to be laid-off; nobody raised their hand. Hymas then told employees they needed to think about helping the company and embrace 12-hour shifts.[20] He also told them that both the company and workers needed to help each other out. As Hymas was speaking, Aguilar – who was wearing a Steelworkers Union t-shirt – started visibly shaking his head "no," from shoulder to shoulder. (Tr. 925-26, 947-54).

Hymas then showed another video, depicting a new employee who had performed extra work cleaning up his work area. Hymas stopped the video and told employees he was looking for someone to be a leader, to step forward and be rewarded and praised for working hard.

[18] The meetings occurred during work-time, and employees were paid for their attendance. (Tr. 956; 936. 923)
[19] Employees use these panels to receive their work assignments and communicate with their supervisors (Tr. 956)
[20] At the time of the meeting, employees were working 8 hour shifts. (Tr. 927) Also, under the BLA, employees could work extended shifts only if both ASARCO and the Union agreed. (GC. 4)

Hymas said the employee in the video was a good worker, one who did a little extra trying to help the company, and that the company should think about giving this worker a raise. At this point, Aguilar exclaimed "not according to Kotraba. Kotraba takes $2 away from a runner position." Aguilar was upset his pay had been reduced after Kotraba became the Ray mine manager about a year earlier. Hymas asked Aguilar to repeat what he said and someone in the audience shouted "maybe he didn't hear you, say it again." Hymas then grew agitated and told the group that it was obvious he was not getting anywhere with this class, that the meeting was over, and everyone needed to leave; he told employees to have "a good couple of days off." Aguilar left quickly and clocked out for the day.[21] Monize was gathering his belongings when he overheard Hymas say, "who was that asshole," "he's an asshole, what an asshole" and "if that was my employee, I would fire that bastard."[22] Nobody answered Hymas. Monize estimated that there were still about 10 employees in the room when Hymas made these statements, but there is no evidence that anybody other than Monize heard them. (Tr. 827, 924, 927-29, 949-52)

The Consolidated Complaint alleges that Hymas violated Section 8(a)(1) of the Act by: (1) threatening employees with layoff; (2) threatening employees with discharge; and (3) interrogating employees.[23] Respondent does not contest what Hymas said, but asserts Hymas was not Respondent's agent when he made these statements. *Resp't Br.*, at 90-91.

a. Analysis

i. Hymas was Respondent's agent

The Board applies common law principles to determine agency status. *Shen Automotive Dealership Group*, 321 NLRB 586, 593 (1996). These include the concepts of implied and apparent authority. Id. Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to act on his behalf. Id The principal must either intend to cause the third person to believe the agent is authorized to act for him, or the principal should realize this conduct is likely to create such belief. Id. (citing Restatement (Second) of Agency § 27 (1958) cmt. a). Where, under all the circumstances, employees would reasonably believe that somebody is reflecting company policy and acting on behalf of management, agency status is established. *Three Sisters Sportswear Co.*, 312 NLRB 853, 864-65 (1993) (agency status created when employer placed people in the position of a conduit where employees could reasonably believe that they spoke on behalf of management).

The Board has found that consultants hired by an employer to convey its message directly to employees are agents of the employer, and the statements they make can be attributed directly to the employer. *Allegany Aggregates*, 311 NLRB 1165-66 (1993); *Acme Bus Corp.*, 320 NLRB 458, 460 fn. 4 (1995), enfd. 198 F.3d 233 (2d Cir. 1999) (Table). Here, Hymas was hired by

[21] Aguilar testified that he left, since it was the end of the shift, Hymas told them they could leave, and he "consider[ed] him like a boss." This shift was scheduled to be off for two days before returning to work. (Tr. 930)
[22] Given the context, it is clear that Hymas referring to Aguilar. And Monize believed that to be the case. (Tr. 952)
[23] The threat and interrogation allegations were amended into the Consolidated Complaint. (GC. 1(ai); Tr. 9)

Respondent to convey a message approved by ASARCO directly to employees.[24] Before Hymas spoke he met directly with Kotraba and discussed the goals for his talk and what was happening at the mine. Employees were summoned to the meeting by an announcement on their dispatch radios, and via the dispatch panel they use to receive job assignments. Attendance was mandatory, a supervisor took attendance, and employees were on the clock while at the meeting. All this provides a reasonable basis for employees to believe that Respondent had authorized Hymas to speak on its behalf during these meetings. The fact Hymas ended the meeting at his discretion, told employees to leave and to "have a good couple of days off" further supports such a finding. As such, considering all the circumstances, I find that employees would reasonably believe that Hymas was acting on Respondent's behalf during these meetings, that Hymas was an agent of Respondent, and Respondent is therefore responsible for his actions and statements.[25] *Allegany Aggregates*, 311 NLRB at 1165-66.

ii. Hymas threatened employees with layoff

Hymas asked employees to raise their hands if they wanted to be laid off, in the context of saying the company was in a tight spot, and employees needed to help cut costs by embracing 12-hour shifts. I find this statement, in context, was aimed at sending a message to employees that they ran the risk of layoff if they did not agree to adopt Respondent's proposal on extended shifts, and was made without any objective evidence supporting the proposition. The statement therefore violated Section 8(a)(1) of the Act. See *Blaser Tool & Mold Co., Inc.*, 196 NLRB 374, 374 (1972) (statement from company president stating concern that major customer might stop doing business with the company if employees voted for the union constituted an implied threat of job loss and plant closure, as there was no objective factual basis for the comment); *NLRB v. Kolmar Laboratories, Inc.*, 387 F.2d 833, 837 (7th Cir. 1967) (predictions of untoward economic events may constitute an illegal threat if the company has it within its power to make the prediction come true); *North Star Steel Company,* 347 NLRB 1364, 1365-66 (2006) (statement by employer's agent that company would lose flexibility during economic downturns if employees unionized a violation as the company furnished no objective basis for claiming that unionization would adversely affect its ability to be flexible during economic downturns).

iii. Hymas did not interrogate or threaten employees with discharge

Citing *Rossmore House*, 269 NLRB 1176, 1178 fn.20, (1984), the General Counsel asserts that Hymas interrogated employees when, in referencing Aguilar, he said "who was that asshole." However, Aguilar's identity to the company was not a secret, and Hymas made the statement to nobody in general. Under the totality of the circumstances, in my opinion, the statement does constitute an interrogation.

[24] In a March 23, 2015 letter to a colleague Kotraba stated that, along with his stock training, Hymas was willing to do "much MORE; all you need to do is ask. Tough situations, employee issues, on-site or off-site, he is willing to address concerns that are facing the operation and its people in a delicate and respectful manner." (GC. 89) Clearly, Respondent's attempt to get the Union to agree to its extended shift proposal was such one such "tough" situation, and Respondent was using Hymas as its conduit for transmitting the company's position to employees.

[25] Respondent asserts that Hymas was not authorized to make the statements attributed to him. *Resp't Br.*, at 90-91. However, Section 2(13) of the Act specifically states that, "[i]n determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

Finally, relying upon *Station Casinos, Inc.*, 358 NLRB 637, 643 (2012), the General Counsel alleges that Hymas threatened employees with discharge when he said, again referring to Aguilar, "if that was my employee, I would fire that bastard." In *Station Casinos*, a company supervisor told a known union committee leader "to be quiet about work conditions and staffing shortage complaints or he might end up being discharged," like another union committee leader who was fired. *Station Casinos, Inc.*, 358 NLRB at 643. The Board found this statement constituted an illegal threat. Id. at 637. I find the threat in *Station Casinos* is distinguishable from Hymas's general exclamation that, if Aguilar worked for Hymas, he would be fired. Unlike *Station Casinos*, Hymas' statement was not made directly to Aguilar, who was not even present when this statement was made. Moreover, there is no evidence that anybody other than Monize actually heard the statement, or that the statement was disseminated to others. As *Station Casinos* is this is the only case cited by the General Counsel to support the allegation, I find the facts here distinguishable and recommend the allegation be dismissed.

B. Alleged Unlawful Discharges

The Consolidated Complaint alleges that Respondent violated the Act by discharging Manuel Orcasitas ("Orcasitas") and Kenneth Dickey ("Dickey"). Regarding Orcasitas, the General Counsel alleges that he was fired on August 18, 2015 for engaging in protected activities and union activities in violation of Sections 8(a)(1) and 8(a)(3) of the Act. As for Dickey, the government alleges Dickey was discharged on January 21, 2016 for engaging in protected activities, union activities, and because he gave an affidavit to the Board, cooperated in a Board investigation, threatened to file a charge with the Board, and/or the company believed he engaged in these activities, in violation of Sections 8(a)(1), 8(a)(3) and 8(a)(4) of the Act.

1. Legal framework

To determine whether an employee's termination is unlawful, the Board applies the burden shifting analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).[26] Under this framework, the General Counsel must prove by a preponderance of the evidence that an employee's union or protected activity was a motivating factor in the employer's actions. The elements required to support such a showing are union or protected concerted activity, the employer's knowledge of that activity, and animus on the part of the employer.[27] See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

[26] While *Wright Line* involved an 8(a)(3) violation, the same framework is used to analyze discharges alleging violations of Section 8(a)(1) and Section 8(a)(4) of the Act. *See NLRB v. Main St. Terrace Care Center*, 218 F.3d 531, 540–41 (6th Cir. 2000) (applying *Wright Line* to uphold Board's finding that employer discharged worker for engaging in concerted activity in violation of Section 8(a)(1) of the Act); *NLRB v. Overseas Motor, Inc.*, 721 F.2d 570, 571 (6th Cir. 1983) (applying *Wright Line* to sustain the Board's finding of an unlawful discharge in violation of Section 8(a)(4) of the Act).

[27] Proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to show an "undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).

If the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. Id. at 1066; see also *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996) (by shifting the burden the employer's justification becomes an affirmative defense). Where an employer's explanation is "pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel Corp.,* 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).[28]

2. Discharge of Manual Orcasitas

a. Facts

Until his discharge, Orcasitas worked at the Hayden concentrator as a carpenter; he had worked for ASARCO since 2004. Three carpenters worked out of the carpenter's shop at Hayden: Orcasitas, Ken Mongeon ("Mongeon"), and Frank Gutierrez ("Gutierrez"). The Hayden concentrator encompasses a large area and the carpenters work throughout the facility. (Tr. 799, 1021-24, 2143-44)

The three carpenters reported directly to Fred Stout ("Stout"), the maintenance shop supervisor. Stout reports to David Boyd ("Boyd"), the general maintenance supervisor, who in turn reports to Syd Lloyd ("Lloyd"), the Hayden concentrator manager. Lloyd reports to Joe Wilhelm ("Wilhelm"), the General Manager for all Hayden operations including both the concentrator and the smelter. At the time of Orcasitas' discharge, Carol Hawkins ("Hawkins"), the human resources manager for Hayden, reported directly to Wilhelm. (Tr. 262-63, 348, 775-76, 824-26, 1024)

Orcasitas was active in carpenters' union, and held a variety of offices. These included union steward and member of the safety committee.[29] He also was a member of the contract negotiating committee, attending bargaining sessions from 2013 until March 2015. Orcasitas's position as a union steward, along with his membership on the bargaining, safety and negotiating committees, were well known amongst Respondent's various management officials, including Hawkins and Wilhelm. (Tr. 265-68, 364-66, 806, 1025-30; GC. 49)

i. January 2013 asbestos incident

On January 23, 2013, Stout assigned Orcasitas, Mongeon, and Gutierrez to demolish the roof on the old environmental building, which was built sometime before the 1940's.[30] Because it was an old building, Mongeon asked Stout whether the building had been checked for asbestos. Stout replied that the building had already been tested, "get the fuck up there." (Tr. 828, 1031-33, 1162-63; GC. 91)

[28] Similarly, where the "proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation." *Roadway Express*, 327 NLRB 25, 26 (1998).
[29] The safety committee documented safety deficiencies, conducted safety inspections, had the ability to tape off unsafe areas, and held monthly meetings to address safety issues. (Tr. 265-66, 364, 779, 1026-28)
[30] The Hayden concentrator itself was built in 1911. (Tr. 784)

The three carpenters started demolishing the roof, peeling back layers until they hit black tar board that smelled like kerosene. Mongeon suspected the material was very old and the smell signified the presence of asbestos. Mongeon discussed his suspicions with his coworkers, and recommended having the sample tested. Mongeon took a sample from the roof, and sealed it in a plastic bag. At lunchtime Mongeon and Orcasitas drove to the administration building to see Lucretia Baum ("Baum"), ASARCO's environmental engineer, while Gutierrez went back to the shop. As Orcasitas waited in the truck, Mongeon gave the sample to Baum, telling her where the sample was from and asking that it be tested for asbestos. Mongeon and Orcasitas then went back to the shop for lunch. (Tr. 1035-38, 1164-67; GC. 91)

At the shop, with the other carpenters present, Mongeon told Stout that they gave Baum a sample from the roof and asked to have it tested for asbestos. Stout said the building had already been tested. After lunch, the carpenters worked on the roof for the rest of the day, and continued working on the roof through the end of the week; they were about half-way finished demolishing the roof by the weekend. (Tr. 1039, 1168; 1063-68)

It turns out that, before ordering the carpenters to demolish the roof, Respondent had done nothing to determine whether the roof contained asbestos. On Friday, January 25 Baum received the test results from the lab showing that one layer of the two layer sample contained between 40% to 50% chysotile asbestos, and may have presented an imminent danger to the carpenters working with the material. (Tr. 272, 338;GC. 91, p. 9)

On Monday, January 28 at the beginning of the work day, Mongeon was in the bathroom when Stout came told him the test came back positive for asbestos. Stout also announced the test results to the carpenters after the morning safety meeting. At Orcasitas's request, Stout showed him the report and Orcasitas shared it with Gutierrez and Mongeon. The carpenters asked Stout what would happen next, but Stout did not know. (Tr. 1039-41, 1169; GC. 91, p. 9-10)

The carpenters were pulled off the job. Subcontractors working with special equipment were hired to finish demolishing the roof and to clean up the worksite. In all, the contractors were at the jobsite for about a week. (Tr. 273, 1041-42, 1150, 1169-70, 1150

After the contractors had finished, Orcasitas and Mongeon returned to the old environmental building and saw that the pipes were covered with dust and a pile of roofing material was still on the site. Mongeon and Orcasitas discussed the matter, and back at the shop they reported to Stout that there was still debris at the site. Orcasitas also asked Stout if the carpenters would undergo testing because of their asbestos exposure; Stout replied that he would take care of it. (Tr. 1042-45, 1174-75)

The next day, Wilhelm came to the morning safety meeting. With him were Boyd, Stout, safety manager Ron Knight ("Knight"), and safety supervisor Rick Lopez ("Lopez"). Wilhelm addressed the carpenters saying that he could not find a test for the roof, and did not know if one had been performed. He told them "my bad, the buck stops with me." (Tr. 376, 1026, 1172-73)

Wilhelm then accused Mongeon of not following the proper procedure regarding the asbestos sample, saying the sample could have come from anywhere – including Mongeon's house. Instead, Wilhelm said the carpenters should have reported the matter to management, and someone from management would have taken the sample. Mongeon replied that he knew it was asbestos from the smell, and both he and Orcasitas insisted that the sample came from the old environmental building – not from Mongeon's house. Wilhelm dismissively replied that he did not know asbestos smelled, did not know where the sample came from, and there was nothing he could do about it. Wilhelm then said that he was not going to lose sleep over the incident because the carpenters were not "up there" long enough to cause any damage to themselves. Orcasitas replied that he was "going to lose fucking sleep over it." Knight then spoke about the proper protocol for taking a sample, which involved contacting management about the problem. (Tr. 1049-51, 1172-73)

After the meeting, as the three carpenters were gathering their tools, they discussed in disbelief what had just occurred. Orcasitas told his colleagues that the company was not going to do anything for them, and suggested a call to the Mine Health Safety Administration (MSHA).[31] Gutierrez and Mongeon agreed, and told him to call. Orcasitas then placed a call to MSHA, and was told that an inspector would be sent to the facility. After the call, Orcasitas debriefed his coworkers about his conversation, and then told Stout that he had just contacted MSHA; Stout did not respond.[32] (1051-54, 1175)

The next day, after the morning safety meeting, Stout told Orcasitas to report to the safety office because an MSHA investigator was there. When Orcasitas arrived at the safety office, the MSHA investigator was standing next to Lopez. The MSHA agent told Orcasitas that he was there on a complaint, and Orcasitas replied that he was the one who called MSHA. Orcasitas gave a synopsis of what had occurred, and the investigator asked Lopez to drive them to the location.[33] At the work site, Orcasitas started pointing out the debris from the old roof and the investigator asked Lopez to call the environmental engineer. Soon after, Baum arrived. The investigator instructed her to bag, label, and test various samples that Orcasitas pointed out, and Baum complied. Ultimately, the MSHA inspector told Lopez to cordon off the entire area until they received the test results from the samples. Orcasitas spent about 2 ½ hours with the MSHA inspector that day. (Tr. 1055-59, 1174-76)

A few days later, remediation contractors were once again brought to the site to perform further cleanup, which lasted for about a week. The asbestos cleanup costs totaled between $50,000 to $100,000. On February 5, the MSHA investigator issued Respondent a citation and assessed a $7,578 a civil penalty against the company, noting the investigator's findings of "gravity and negligence" on the part of ASARCO. Points were also assigned to the company's safety record. (Tr. 833, 1061-62; 1176-77, 833; GC. 91)

[31] The Mine Safety Health Administration is established within the Department of Labor and enforces the Federal Mine Safety and Health Act of 1997 [30 U.S.C.A. § 801 et seq.]. See 29 U.S.C.A. § 557a.

[32] When asked whether he knew it was Orcasitas that called in the MSHA complaint, Stout testified "I don't have that information. I have no idea who makes complaints to anybody." (Tr. 274) While MSHA may not have specifically identified Orcasitas as the complainant, Stout did not deny that Orcasitas told him that he called MSHA. In any event, I credit Orcasitas that he told Stout about the call to MSHA.

[33] Both Wilhelm and Lloyd knew Orcasitas accompanied the MSHA agent during the inspection. (Tr. 785, 832)

Both Orcasitas and Mongeon testified that, after MSHA investigator left, Stout treated the carpenters differently, keeping his distance and no longer being friendly. One day he even told Orcasitas that he almost got fired "thanks to you guys." Thereafter, Orcasitas provided Stout with a list of about seventeen people who had been exposed to asbestos, apparently at the request of Respondent's insurance carrier. The three carpenters were put into a program involving annual x-ray screening to monitor their asbestos exposure. (Tr. 833-34, 1062-64, 1177)

ii. Silica cloud incident

In August 2014, Mongeon and Orcasitas were working at the waste launderer when they saw contractors using grinders to smooth a mortar base, resulting in a large white dust cloud drifting throughout the area.[34] They looked at the bags of mortar and saw the material contained silica.[35] (Tr. 1066-67, 1177-78)

The pair went back to the carpenter's shop and told Stout about what happened. The next day, Lloyd was waiting at the shop when the carpenters returned for lunch. As Mongeon watched, Lloyd and Orcasitas got into a heated argument over silica, with Orcasitas trying to explain silica's danger. At one point during the exchange, Lloyd put his hands on Orcasitas's shoulders. Orcasitas told Lloyd to remove his hands, and when Lloyd did not respond, he said "get your fucking hands off me." Lloyd removed his hands from Orcasitas and the dispute ended. However, Orcasitas was unwilling to let the matter rest. He filed a complaint against Lloyd with human resources, a charge against Lloyd with the NLRB, and a police incident report accusing Lloyd of disorderly conduct/assault. Ultimately, the matter was resolved with Lloyd agreeing to stay away from Orcasitas, who testified that he dropped the police and NLRB charges (Tr. 1076-1085, 1177-79; GC. 93-95)

iii. Incident between Orcasitas and a consultant

In August 2014 Orcasitas received a two day suspension for an incident involving a consultant at the mill. Respondent had hired former combat fighter pilots as consultants to assist with communications across the various crafts. While the company encouraged employees to participate in the program, it was not mandatory. (Tr. 1936-37, 1947)

One day Orcasitas was working with a group of laborers to remove a concrete sidewalk so the carpenters could pour a new walkway. An equipment operator was also assigned to the job operating a small front-loader. One of the consultants was at the project to watch how the Orcasitas interfaced with the equipment operator. (Tr. 1089-95, 1937-38)

Orcasitas gave hand signals to the operator, as the laborers broke the sidewalk into pieces and placed the concrete into the loader bucket. Orcasitas accused the contractor of getting in the

[34] The waste launderer is a large pool that collects copper waste byproducts. (Tr. 1065)

[35] Silica, also known as silicon dioxide, is the primary ingredient in sand and 95% of the earth's rock. *In re Silica Products Liability Litigation*, 398 F. Supp. 2d 563, 569 (S.D. Tex. 2005) However, "if sand or rocks are chipped, cut, drilled or ground, respirable-sized particles of silica may be produced, and the mineral becomes potentially dangerous. Inhaled silica particles may be trapped in the lungs, causing areas of swelling and scarring," which over time can grow and potentially become fatal. Id.

way and almost getting hit by the loader bucket. An exchange of words ensued. As the two were arguing, Stout arrived at the jobsite. Orcasitas told Stout the consultant was endangering the lives of the workers, as well as his own life, and asked that he be removed from the job. Orcasitas took a 15 minute break, and when he returned the contractor was gone. (Tr. 1095)

The consultant complained to Lloyd, claiming Orcasitas had "unloaded" on him regarding the verbal altercation. Lloyd was concerned because Orcasitas allegedly used profanity, and the other employees present did not corroborate Orcasitas' claim that the consultant's conduct was unsafe. (Tr. 1941-46)

A few days later, Orcasitas received a two day suspension. During the disciplinary meeting, Lloyd told Orcasitas that he cursed at the contractor. While Orcasitas protested, saying he only told the contractor to move out of the way, it was to no avail, and he served a two day suspension. At trial, Lloyd testified that Orcasitas had created a "hostile work environment." (Tr. 838-40, 1099-1100)

iv. August 2015 track hopper lockout, tag-out, tryout, incident

On August 10, 2015, at about 2:00 p.m., Orcasitas, Mongeon, and Gutierrez were sent to the track hopper to put wooden scaffolding over a conveyor belt so mechanics could perform maintenance work while the belt was moving.[36] Whenever employees work on a piece of equipment, they are required to lockout, tag-out, and tryout the equipment. Each hourly employee has their own specific padlock, with only one key, to place on the energy source switch of the specific equipment they are working on. If multiple employees are working on the same machine, they use a "lockout tree" where multiple locks can be placed. After locking out, each employee places a tag on the lock, identifying the employee's name, date, and the work they are performing. Finally, employees are required to tryout the equipment to ensure it is not operational. (Tr. 1101, 1182, 2012-2069; R. 16, 17)

When the carpenters arrived at the track hopper, mechanic John Acevedo ("Acevedo") pointed them to operations supervisor Machado.[37] A group of laborers were preparing to enter the track hopper, and Orcasitas asked Machado if the laborers were locked and tried out. Machado pointed to a breaker box and said yes. The carpenters saw that about six locks had been placed on the breaker-box marked "C-2," so they placed their locks there as well, thinking they were locking out the conveyor belt because they were working on the C-2 belt. It is undisputed that, at no time that day, did the carpenters tryout the belt to ensure the power source had actually been disabled. (Tr. 1103-06, 1103, 1144, 1137, 1152, 1182, 1189-94, 1894, 2142)

The three carpenters entered the track hopper and went about their work placing scaffolding over the conveyor belt. However, they realized they needed additional wooden boards from the shop. A one-person elevator is used to ascend to the surface, so Gutierrez and

[36] The track hopper is a large feeder bin that funnels ore onto a conveyor belt. Railcars full of ore move into the track hopper building and ore is dropped from the railcars into the track hopper. The ore is eventually funneled onto an oscillating pan that allows the material to evenly flow onto the conveyor belt. The conveyor belt runs up a 500 foot incline into the crusher. (Tr. 1101, 2077-80, 2085-89, 2108-09, 2165; R. 17-20)

[37] That was the only time Orcasitas saw Acevedo that day. (Tr. 1144)

Mongeon went to the surface and drove back to the shop. Orcasitas was the last one to use the elevator, and when he got to the top Gutierrez and Mongeon were already driving to the shop.[38] Orcasitas eventually arrived at the shop and the carpenters cut the additional boards they needed and went back to the track hopper. (Tr. 1152, 1183-84, 2162)

When they returned to the track hopper nobody else present. The carpenters locked out in the same location as before, went back down into the hopper, and placed the additional boards over the conveyor belt. They also needed to fasten plywood siding to the edges of the scaffolding. As they finished securing the plywood, the conveyor belt abruptly moved about five feet. The carpenters realized something was wrong, causing them great concern. They thought the belt had been locked out, plus the safety alarm did not sound before the belt moved. After the conveyor belt is turned on, there is supposed to be a 30 second delay before it activates while a warning alarm sounds to give workers time to move safely out of the way. Accordingly, the carpenters decided to report the incident. As nobody else was present, had the carpenters not self-reported the episode, nobody would have known what occurred. (Tr. 1116-18, 1184-85, 1194, 2107, 2118-19; 2149)

The carpenters went back to the shop and found Stout, who was with mechanic foreman Kenny David. Orcasitas told them the conveyor belt moved without an alarm sounding, while the carpenters were locked. Later that day, Stout told the carpenters that they were to meet at the track hopper the next day for an investigation into what had occurred. (Tr. 1119-20, 1185)

The next day Respondent conducted an investigation into the incident. Present were Mike Crisp ("Crisp"), Jesus Aguirre ("Aguirre"),[39] Boyd, Stout, Mongeon, Orcasitas, and Gutierrez; Crisp led the investigation.[40] They met at the track hopper and the carpenters recreated what happened when the belt moved without the alarm sounding. (Tr. 1186, 2112-17)

The carpenters showed Crisp where they had locked-out, explaining their belief that it was the breaker for the C-2 belt. All of them admitted not trying out the system. As for the alarm not sounding, Crisp opened the electrical box and found the alarm fuse had been removed and was at the bottom of the box. Crisp held the fuse in the air, announcing that the reason the alarm did not sound was because someone had removed the fuse.[41] (Tr. 1120-23, 1187, 2117)

As it turned out, the carpenters had locked-out the wrong breaker. Instead of locking out the conveyor belt, they had locked out the C-2 oscillating feeder pan. The lockout for the conveyor belt was located about 200 yards away next to the crusher building. However, nobody ever showed the carpenters the exact location to lockout the conveyor belt. (Tr. 1123-30,1187-89, 1195-96, 2115-16, 2092, 2134; R. 17 p.5)

[38] This was the only time the three carpenters were not together that day. I credit Mongeon's testimony that Orcasitas was "the only one down there" inside the track hopper at the time. (Tr. 1183)
[39] Aguirre was working in the safety department at the time. (297, 2112)
[40] The transcripts sometimes refer to Crisp as "Mick" or "Mic." (Tr. 297, 1028, 2060, 1134, 1148, 1186, 2059)
[41] The investigation team also spent some time looking for an area to place another alarm speaker, as it was difficult to hear the actual alarm. (Tr. 1130)

After the investigation, Crisp returned to his office and drafted an incident report. He also spoke with Lloyd and Hawkins, telling Hawkins that the lockout, tag-out, tryout procedures were not followed. Sometime later that same day, concentrator mechanic Ralph Ballesteros contacted Crisp about an alleged interaction between himself and Orcasitas the previous day. Crisp told both Hawkins and Boyd about his conversation with Ballesteros.[42] (Tr. 2119-25)

As a result of the investigation, Respondent undertook various remedial actions. A lock was installed on the alarm's electrical box, so that only authorized electricians could open it. They also installed another alarm in the area, to ensure the conveyor belt's warning sound was audible throughout the area. Also, labels to the track hopper breaker boxes were changed to more clearly identify the equipment. (Tr. 2146-50)

v. Disciplinary investigation into the actions of the carpenters

On August 12, Stout gave each carpenter an individual "Notice of Disciplinary Action," requiring them to report to the human resources office the next morning for a hearing into their failure to lockout, tag-out, and tryout the conveyor belt. According to Respondent, a Notice of Disciplinary Action is issued whenever the company intends to discipline someone. Some sort of discipline will issue, but the level of discipline will be determined after the hearing. Orcasitas called the Manny Armenta Jr. ("Armenta Jr."), President of Steelworkers Local 915, to attend the hearing as the employees' Union representative. (GC. 50, 51; 57, Tr. 401-02, 1131-32, 1290)

The next day, the carpenters reported to the human resources office; their interviews were scheduled 15 minutes apart. Each carpenters was interviewed separately, one after the other. According to Hawkins, these were disciplinary hearings, with the purpose of gathering facts. (Tr. 372-73, 1191, 2324)

The same people were present for all three interviews: Hawkins, Boyd, Crisp, Knight, Aguirre, and Wilhelm attended for the employer. Armenta Jr. was present for the Union, and took notes of the three meetings. (U. 9; Tr. 376-77, 1729; 2120, 2321)

In their individual meetings, the carpenters were asked to describe what occurred the day in question, which they did. After they finished interviewing the last carpenter, Crisp asked Wilhelm whether they were going to interview anybody else regarding the incident. Wilhelm said they were done, that a miscommunication occurred on the part of both parties, and it was clear that both the company and the carpenters were in the wrong. Wilhelm stated he wasn't going to get into any game of "he said, she said," and what they need to do was to make sure employees were correctly trained to know the proper lockout locations and to ensure the

[42] Ballesteros and Orcasitas were not friends. A few years earlier, at a time when tools had been missing from the carpenter's workshop, Orcasitas found Ballesteros in the shop at 1:30 a.m., with one of the lockers open. Orcasitas reported Ballesteros to management and an investigation ensued. Orcasitas was present when Crisp made Ballesteros open his locker while they searched it. Ballesteros earned the nickname "Nightcrawler" for this incident. His nickname was well known at the mine, including by management officials. Lloyd knew about the incident which gave rise to the Nightcrawler nickname. (Tr. 802, 842-43, 1194, 1144-48, 1194, 2153)

management teams know the right procedures.[43] Armenta Jr. asked Wilhelm to confirm that they were finished for the day, which he did; Armenta then left. (Tr. 1291, 2320-21; U. 9)

However, it appears that some members of the panel were not done. About 40 minutes after the investigatory meetings ended, some members of the panel, including Hawkins and Crisp, spoke with Ballesteros and Acevedo. This was done without Wilhelm or Armenta Jr. present. Ballesteros claimed that on the day in question he and Orcasitas had an argument; Ballesteros allegedly told Orcasitas he was locked out in the wrong place, and Orcasitas replied "fuck you."[44] According to Hawkins, this interaction occurred when Gutierrez and Mongeon were not present. Respondent could not explain why Ballesteros was not summoned to the investigatory meeting earlier that day, even though they knew his claims beforehand. (Tr. 383, 396-97, 807, 2121-24)

Neither Orcasitas, Mongeon, nor Gutierrez were ever asked about the allegations made by Ballesteros in their investigatory meetings. Both Mongeon and Orcasitas testified that they did not see Ballesteros at the track hopper that day.[45] Indeed, the first time Orcasitas learned that he was accused of cursing at Ballesteros was when he received his termination letter. (Tr. 1138-39, 1143-44, 1193-94; U. 9)

vi. Decision to terminate Orcasitas

On August 18, 2015, Mongeon, Gutierrez, and Orcasitas were informed of their respective disciplines. All three received letters signed by Hawkins, with copies to Wilhelm and Lloyd. Gutierrez and Orcasitas were both suspended for five days for failing to properly lockout and tryout the conveyor belt. Orcasitas was fired. Along with failing to properly lockout and tryout the conveyor belt, Orcasitas's termination letter states:

> A witness in this incident testified that he . . . informed you that you needed to lock out the belt to which you relied "fuck you." It is very disturbing that although a coworker pointed out that you were not locked out properly that you chose to continue working around the belt without proper precautions and allowed two of your coworkers to continue to work in close proximity along with you.

Because Orcasitas served a two day suspension in August 2015, the letter states that "the next step in progressive discipline is termination of your employment." Accordingly, Orcasitas was fired on August 18. (GC. 52-54)

As to who made the ultimate decision to fire Orcasitas, the testimony from Respondent's management officials varied. Stout, the carpenters' direct supervisor, testified that Boyd was the only decision maker. While he discussed the issue with Boyd, Stout claims he made no

[43] Wilhelm was specifically referring to Ballesteros, who was not at the investigative hearing, regarding his "he said, she said," comment. (Tr. 805)

[44] Although Respondent claims that Acevedo corroborated Ballesteros' story, and both testified before Hawkins and Crisp, Hawkins testified that only Ballesteros told her that Orcasitas said "F you." (Tr. 383-84)

[45] Neither Ballesteros nor Acevedo testified at the unfair labor practice hearing. I credit the testimony of Orcasitas and Mongeon and find that Ballesteros was not at the track hopper that day, and his alleged interaction with Orcasitas never occurred.

recommendation regarding discipline. Wilhelm testified that he approves all terminations. According to Wilhelm, while management and human resources officials make recommendations to him, he is the one who has the final say. Hawkins testified that no single person makes a decision regarding discipline, but that it is a group decision. Hawkins testified the decision to terminate Orcasitas was jointly made by her, Wilhelm, Lloyd, and Boyd. When asked if anybody has the "final call" regarding a discharge, Hawkins stated that Trevino, the corporate human resources director, makes the ultimate decision but that he as always agreed with her recommendation. Notwithstanding Hawkins' testimony, Lloyd denied that he was involved in the decision to fire Orcasitas. Instead, Lloyd testified his only involvement with the matter was handing out the final termination notice. (Tr. 297-98, 389-90, 361-62, 794-95, 800, 808, 838)

As to why Orcasitas was fired, while Mongeon and Gutierrez were suspended, Wilhelm testified that Orcasitas was fired because of his encounter with Ballesteros. Wilhelm acknowledged that all three carpenters were responsible for ensuring that the lockout, tag-out, tryout procedures were followed, but that the "difference between the three was Mr. Orcasitas' encounter with" Ballesteros. Hawkins testified Orcasitas was fired, while the others were not, because of his disciplinary record compared to the other two, and the alleged incident involving Ballesteros.[46] (Tr. 383, 800-01)

a. Analysis

i. Orcasitas's union and concerted activities

Evidence of Orcasitas's union activities is widespread. He was a steward, member of the Union safety and negotiating committees, and actively attended bargaining sessions through March 2015. There can also be little doubt that Orcasitas engaged in other protected, concerted activities, including when he contacted MSHA about asbestos exposure at Respondent's worksite. *American Steel Works*, 263 NLRB 826, 826, 830 (1982) (contacting OSHA relating to health and safety in the plant constituted concerted activity). This is particularly true here, where Orcasitas discussed the matter with his coworkers and received their approval to contact MSHA. *North Carolina Prisoner Legal Services, Inc.*, 351 NLRB 464, 465 (2007) (individual employee engaged in concerted activity by filing an EEOC charge on behalf of herself and similarly situated workers, where she informed her coworkers and obtained their support to file the charge). Also, by simply bringing employee asbestos concerns to the attention of management, Orcasitas, Mongeon, and Gutierrez were all engaged in protected activity. *Remgrit Corp.*, 297 NLRB 803, 814 (1990) (employees engaged in concerted activities by initiating asbestos complaints and calling OSHA after they deemed their employer's response unsatisfactory).

Orcasitas also engaged in other protected conduct. The charge he filed against Respondent with the NLRB regarding his altercation with Lloyd is protected by the Act. *Braun Electric Co., Inc.*, 324 NLRB 1, 3 (1997) (filing charge with the Board is protected activity). The complaint he and Mongeon made about the safety cloud was also protected and concerted. *Talsol Corp.*, 317 NLRB 290, 317 (1995) (employee engaged in concerted activity by raising

[46] O August 19, 2015, the Union filed a grievance over Orcasitas's discharge, which was ultimately denied. Because the contract had expired, the Union could not take the grievance to arbitration. (Tr. 393-95, 1139-40; GC. 56)

concerns at safety meeting that affected not only himself, but all other employees). Orcasitas and his coworkers also engaged in protected concerted activity when they reported to management that the conveyor belt alarm malfunctioned, and did not sound. *Covanta Bristol, Inc.*, 356 NLRB 246, fn. 1, 254 (2010) (Board acknowledging that employee engaged in protected concerted activity by filing a "near miss report" raising safety concerns).

ii. Knowledge

The evidence shows that Respondent knew about Orcasitas's union and other protected concerted activities. Respondent knew Orcasitas was the Union's the safety representative and steward, and also knew he was an active member of the bargaining committee.

Regarding the asbestos incident, I find that the evidence supports a finding that Respondent knew, or highly suspected, that Orcasitas was the one that called MSHA, and feigned attempts at ignorance by Respondent's officials are not worthy of belief. I credit Orcasitas's testimony that he told Stout he called MSHA. Moreover, when the MSHA investigator arrived, Orcasitas stated – in the presence of safety supervisor Lopez – that he was the one that called; Orcasitas then spent 2 ½ hours with the MSHA inspector, picking out samples to be tested. Both Wilhelm and Lloyd admitted that they knew Orcasitas was the one who accompanied the MSHA investigator during the inspection. Also, Orcasitas was the carpenter who specifically challenged Wilhelm, in the presence of Boyd, Stout, Knight, and Lopez, by saying that he was "going to lose fucking sleep," over the asbestos exposure. As such, the evidence supports a finding that Respondent's officials knew that Orcasitas called MSHA, that those who claimed a lack of knowledge highly suspected Orcasitas was the tipster. Respondent further knew that Orcasitas participated in the MSHA investigation resulting from the carpenters' concerted complaints.

Regarding the remaining concerted activity, Wilhelm and Lloyd both knew of Orcasitas's NLRB charge against Lloyd. And Respondent clearly knew about the concerted complaints regarding the malfunctioned alarm, both as it was self-reported by the carpenters on the day of the incident, and during the ensuing investigation.[47]

iii. Animus

The various 8(a)(1) violations here are sufficient to show a general animus. *Dynasteel Corp.*, 346 NLRB 86, 88 (2005) ("The Respondent's numerous 8(a)(1) violations provide evidence of its anti-union animus"). Further, the 8(a)(5) violations, including unilateral changes, also support a finding of animus. *Galicks, Inc.*, 354 NLRB 295, 298 (2009) affirmed 355 NLRB 366 (2010) enfd. 670 F.3d 602 (6th Cir. 2012) ("Conduct violative of Section 8(a)(5) may evidence union animus); *Overnite Transportation Co.*, 335 NLRB 372, 375 (2001) (unilateral implementation of stricter policy, in violation of Section 8(a)(5), in combination with other violations, sufficient to establish that employer harbored antiunion animus).

Also, it was clear from the demeanor of Respondent's witnesses while testifying, along with content of their testimony, that the MSHA asbestos investigation resulting from Orcasitas's

[47] Wilhelm and Hawkins knew the carpenters complained that the alarm malfunctioned. (Tr. 370-71, 380, 797-99)

complaint was still a very sore subject with Respondent. Responsible officials feigned ignorance, deflected criticism, insisted there was only a "trace amount" of asbestos in the sample, and falsely claimed the sample may have been planted by the carpenters, when the facts clearly show otherwise.

For example, when asked about asbestos in the roofing material, Stout testified at trial that employees thought there was a "trace amount" of asbestos, and that lab results showed a "minute reading of it."[48] Wilhelm testified that he did not "know for sure," that the roofing sample tested positive for asbestos, notwithstanding the tens of thousands of dollars Respondent spent on asbestos abatement.[49] When asked about the inconsistency he tried to explain away his previous answer saying he meant that he never actually saw the report.[50] Of course the report showed 45%-50% asbestos in one layer of the roofing sample – hardly a "minute reading." When asked about the roofing material sample that was tested, Lloyd testified the carpenters "took something from somewhere and gave [it] to Ms. Baum. I don't know where it came from."[51] Notwithstanding the MSHA's report, Respondent's fine, and the thousands of dollars paid in remediation, Lloyd was still refusing to admit that the roofing sample came from Respondent's facility. In doing so, he was channeling Wilhelm's lecture to the carpenters in 2013, where he said that the sample could have come from anywhere – including Mongeon's house. Lloyd, Wilhelm, and Stout were sticking to the script contrived three years earlier to claim plausible deniability, and deflect responsibility away from Respondent. The combination of this testimony was incredulous and supports a finding that, even at the time of their testimony in 2016, Respondent still harbored direct and specific animus against the concerted activities of the carpenters in general, and Orcasitas specifically, for reporting Respondent to MSHA and for participating in the MSHA investigation.

iv. Respondent has not rebutted the General Counsel's case

As set forth above, the General Counsel has presented evidence of a prima facie case of discrimination. Accordingly, Respondent bears the burden of persuasion to show it would have fired Orcasitas absent his protected activities. *Consolidated Bus Transit*, 350 NLRB at 1066. ASARCO has not done so.

In an attempt to rebut the General Counsel's case, Respondent asserts that Orcasitas was terminated as a result of: (1) violating the lockout policy by failing to tryout the conveyor belt; (2) his interaction with Ballesteros; and (3) his disciplinary record. *Resp't Br.*, at 53-54. However, rather than rebutting the General Counsel's case, I find that the reasons set forth by Respondent support a finding of pretext.

1. Violating Respondent's lockout policy

Citing the violation of the lockout policy, Respondent asserts that Orcasitas would have been terminated notwithstanding any protected activity. Respondent argues that Orcasitas

[48] See Tr. 270-72.
[49] See Tr. 782-84.
[50] I do not credit Wilhelm's feigned ignorance about the results of the asbestos test.
[51] See Tr. 831.

admitted not trying out the conveyor belt, which "was very serious and could have resulted in severe injury or death," thereby subjecting him to discharge. *Resp't Br.*, at 53. However, it does not appear that Respondent routinely fires employees for violating the lockout policy. See, *Lucky Cab Co.*, 360 NLRB 271, 276, (2014) (disparate treatment is evidence that employer's asserted reason for discharge was false).

For example, the evidence shows that an employee who failed to both lockout and test the main power source before clearing debris from a torn belt, a situation similar to Orcasitas's, was not fired – but was suspended for 10 days. (GC. 47) Six employees received only a verbal warning for violating the lockout policy, while two others received written warnings.[52] (GC. 44-46) Indeed, the evidence presented at trial shows that the only other person fired for violating the lockout policy had already been fired for absenteeism, was returned to work pending resolution of his grievance, had an additional absence, violated the lockout policy, and never appeared for his investigatory hearing. Based on these multiple infractions the employee was again fired. (GC. 48) This situation is hardly comparable to Orcasitas's. Moreover, Mongeon and Gutierrez, who engaged in the exact same conduct as Orcasitas, are the best comparators.[53]

Respondent does not deny that all three carpenters were responsible for complying with the lockout policy, and therefore all three engaged in the exact same violation. To differentiate Orcasitas's discharge, Respondent argues that Mongeon and Gutierrez were only suspended because Orcasitas had a different disciplinary history, and citing testimony from Hawkins that the disciplinary progression at the Hayden concentrator is: counseling, verbal warning, written warning, suspension, and termination.[54] However, Hawkins also testified that while progressive discipline happens "most of the time," human resources, supervisors, and upper management together decide when they should, or should not, follow progressive discipline. (Tr. 356-58)

Prior to the incident at the hopper Gutierrez had no prior disciplines, Mongeon had both a verbal warning and a written warning in his file, while Orcasitas had been suspended for two-days because of the incident with the consultant in August 2014. Although Respondent claims it relied on its progressive disciplinary policy to discharge Orcasitas, there is no explanation as to why Gutierrez received the same discipline as Mongeon. Under the policy outlined by Hawkins, Gutierrez should have only received a verbal warning. Indeed, other employees had received verbal warnings for violating the lockout policy. As such, I find that Respondent cannot point to is purported progressive disciplinary policy as an excuse for firing Orcasitas, while only suspending Mongeon and Gutierrez. Instead, I believe that the disparity in discipline, along with the evidence that employees are not routinely fired for violating the lockout policy, is evidence of is pretext. *Wyman-Gordon Co. v. NLRB*, 654 F.2d 134, 141 (1st Cir. 1981) ("disparate treatment . . . in response to seemingly identical offenses is obviously suggestive of improper motivation.").

[52] Although the notices of disciplinary action in evidence do not contain all the relevant facts surrounding the various incidents, they contain sufficient facts to demonstrate Respondent's treatment of employees who violated the lockout policy. See *United States Gypsum Co.*, 259 NLRB 1105, 1106, fn. 2, (1982).

[53] While all three carpenters engaged in protected activities, it was Orcasitas who: called MSHA; paraded around the facility with the MSHA investigator; openly confronted Wilhelm; and was on the bargaining committee.

[54] See *Resp't Br.*, at 43, fn. 22. Hawkins testified that the progressive disciplinary policy is in the BLA. (Tr. 358) However, neither the BLA nor the Hayden supplement contain a 5 step disciplinary policy as outlined by Hawkins. (GC. 4, 7)

I also find the fact that Wilhelm and Hawkins gave different answers as to why Orcasitas was fired, while Mongeon and Gutierrez were only suspended, as further evidence of unlawful motivation, which supports a finding that Orcasitas's past disciplinary history was not the real reason for his discharge. *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997), enfd. 160 F.3d 353 (7th Cir. 1998) (where employer provides inconsistent or shifting reasons for its actions a reasonable inference can be drawn that the reasons proffered are mere pretext designed to mask an unlawful motive). At trial, when asked why Orcasitas was fired while the others were not, Wilhelm pointed to the alleged incident involving Ballesteros as the deciding factor. Nowhere did Wilhelm, who claimed to have the final say on all discharges, mention the company's progressive disciplinary policy, or Orcasitas' specific disciplinary history. This further supports a finding that Respondent's purported reliance on its progressive disciplinary policy to fire Orcasitas is pretext.

2. Good faith belief the Ballesteros incident occurred

Respondent argues that it does not need to prove the incident between Orcasitas and Ballesteros actually occurred as reported, "but merely that it had a good faith belief that it did so." *Resp't Br.*, at 53. However, I find that Respondent's belief was not held in good faith. *Wells Aluminum Corp.*, 319 NLRB 798, 812-13 (1995), enfd. in relevant part 248 F.3d 1150 (6th Cir. 2000). Instead, I find the circumstances surrounding Respondent's purported reliance on the alleged Ballesteros incident is also evidence of pretext. *Cf. Countryman v. Nordstrom, Inc.*, 2007 WL 38912, at *7 (D. Minn. 2007) (in employment discrimination case, the court notes that the proper inquiry is whether employer had honest belief that the employee was abusing her breaks or whether the employer used "break abuse" as a pretext).

In *Wells Aluminum Corp.*, the employer argued, in part, that based on its investigation it held an honest belief that an employee engaged in misconduct by making threats, and was fired because of these threats, and not for his protected activity. The Board, and the Sixth Circuit, affirmed the ALJ's finding that the employer's "belief" the employee engaged in misconduct was not made in good faith, noting that the termination decision was made the employee was even interviewed about the alleged incident. *Wells Aluminum Corp.*, 319 NLRB at 813. Therefore, the employer did not demonstrate the discharge would have occurred absent the employee's protected conduct. Id. See also *Archer v. Mesaba Aviation, Inc.*, 210 F.3d 371, 2000 WL 376677 *5 (6th Cir. 2000) (unpublished opinion) (Employer may not invoke the "honest belief rule" where, in part, employee was never informed of the allegations against him and the termination letter was prepared before he was given an opportunity to respond to the allegations).

Such is the case here. Before he was fired, Orcasitas was never informed of the allegations against him regarding Ballesteros, nor was he given an opportunity to respond. Indeed, in the August 13 investigation into the lockout incident, Respondent did not ask Orcasitas, Mongeon, or Gutierrez, whether Ballesteros was present on the day in question. At the end of the interviews, when asked whether other employees would be questioned, Wilhelm stated definitively that he did not want to get into a game of "he said, she said." And, Orcasitas first learned of the accusations against him regarding Ballesteros in his termination letter; even then, the letter did not actually name Ballesteros, but just referenced a "coworker." The fact

Respondent claims to have relied, in part, upon the Ballesteros incident to fire Orcasitas, but never appraised Orcasitas of the allegations against him, or gave him an opportunity to respond before he was fired, is evidence of unlawful motive. *Wells Aluminum Corp.*, 319 NLRB at 813. As such, I find that Respondent did not have a good faith belief that the Ballesteros incident occurred, and has not shown Orcasitas would have been discharged in the absence of his protected conduct.

4. Other evidence of pretext

Finally, I find that the inconsistent testimony from Respondent's officials as to who made the ultimate decision to terminate Orcasitas is further evidence of pretext. See *Maywood, Inc.,* 251 NLRB 979, 993–994 (1980) (inconsistent testimony from company witnesses as to who made decision to discharge employee and the reason for the discharge is evidence of pretext to hide the real reason, advocacy for the union); *Planned Building Services, Inc.,* 347 NLRB 670, 713–15 (2006) (in a refusal-to-hire case, inconsistent testimony as to who made decision to not hire employees supports a finding of pretext); *Jennings & Webb, Inc.,* 288 NLRB 682, 687–88 (1988), enfd. 875 F.2d 315 (4th Cir.1989) (conflicting and inconsistent testimony from employer's witnesses, including as to when the decision to terminate employee was made, supports a finding of discriminatory intent); *Black Entertainment Television, Inc.,* 324 NLRB 1161, 1161 (1997) ("The Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its actions, an inference may be drawn that the real reason for its conduct is not among those asserted."). Here, Stout testified that Boyd was the only person to make the discharge decision, Wilhelm testified that he was the ultimate decision maker, while Hawkins testified that herself, Wilhelm, Lloyd, and Boyd all made the decision to discharge Orcasitas jointly. And although Hawkins testified Lloyd was involved in the joint decision to fire Orcasitas, Lloyd denied playing any role whatsoever. This conflicting testimony supports a finding of pretext. Accordingly, I find that Respondent has not rebutted the General Counsel's case, and the evidence supports a finding that Orcasitas was fired because of his protected concerted activities, and his union activities in violation of both Section 8(a)(1) and Section 8(a)(3) of the Act.

2. Discharge of Kenneth Dickey on January 21, 2016

The General Counsel alleges that Respondent violated Sections 8(a)(1), (3) and (4) of the Act when it discharged Kenneth Dickey on January 21, 2016. Respondent denies that Dickey was fired for any of these reasons, but asserts that Dickey was fired for threatening to kill his supervisor.

a. Facts

Dickey worked for ASARCO since 1990, transferring to the Ray Mine in 2003; he has worked as a boilermaker, crane operator, and leadman. In 2015 Dickey was working in the shovel and drill department where his supervisor was George Renteria ("Renteria"). Renteria reported to Bill Towers ("Towers"), who oversaw maintenance. Towers reported to Charles Hansen ("Hansen") the mine maintenance manager, who reported directly to the Ray mine general manager Kotraba. (Tr. 708, 1587, 1635, 1687, 2018)

From 2013 until sometime in 2015[55] Dickey served as a "day-pay supervisor."[56] After he was relieved of these duties, Dickey testified that he had a conversation in a bar with Renteria who told him that Tower said Dickey was "too lenient, and didn't want him in that position any longer."[57] (Tr. 1653, 1687-90, 1698-99, 2018)

i. Dickey's alleged concerted activity

Dickey also attended one of the mandatory meetings with Chad Hymas on October 28, 2015, with about 50 other employees. Michael Real, a shovel and drill mechanic, also attended this meeting, which started at 7:00 a.m.[58] At some point during the meeting Hymas said workers should do the right thing by giving the company 12-hour shifts so it could save 3 cents per pound and eliminate the need for layoffs. Hymas said that he was looking for a leader, "a Moses," and that if employees wanted to get laid off to raise their hand; nobody did. When it came time for questions, Dickey asked Hymas to put "pen to paper" and show how ASARCO calculated its cost savings regarding extended shifts and also said the company needed an agreement with the Union regarding that issue. At this point, Hansen interrupted saying the company was losing money because the two primary roads used for hauling ore to the crusher were closed for safety reasons and told Dickey to come to his office if he wanted the cost savings explained.[59] After Hansen's comment, Hymas adjourned the meeting. (Tr. 1001-11, 1589-92, 1700-08)

On October 28, 2015, Dickey called the guard shack saying he would be out on Union business. He then went to the NLRB offices to give a statement. Sometime in November, during a work break, Dickey told Renteria that he "filed a charge" with the NLRB. Dickey also told his coworkers that he provided a statement to the NLRB, but did not say anything to any supervisor other than Renteria. (Tr. 1703, 1752)

On December 3, 2015, during an employee meeting, Dickey asked Renteria how ASARCO could change employee shifts without bargaining with the Union, asserting this was an illegal unilateral change. At another meeting in December he asked Renteria why the department was going to split crews, ruining the weekend for employees, and questioned whether it was because Union officials worked in the department. No evidence was presented that any other management officials knew of these statements. (Tr. 1713-14)

ii. Dickey's new job bid and his transfer to the truck shop

Sometime in late 2015 employees bid on new job assignments and Dickey chose to move to the truck shop where employees worked four 10 hour shifts with Friday, Saturday, and Sunday off. In the shovel and drill department Dickey worked straight eight hour shifts, with three breaks throughout the day, and at least one day off each weekend. (Tr. 1715-19)

[55] As discussed infra, Dickey continued as day pay supervisor through at least September 2015.
[56] A "day-pay supervisor" is a unit employee who receives higher pay and takes on some supervisory responsibilities, including assigning work. (Tr. 1513-14, 1625, 1689-92; GC. 4, p. 6)
[57] At trial, when asked to repeat what Renteria told him, Dickey changed his testimony to say he was told that Tower said Dickey was "too union." (Tr. 1699) I do not credit Dickey's changed testimony about being "too union."
[58] I credit Real's testimony of what occurred in this meeting.
[59] Later that day, Hansen and Tower were sitting in a truck when Dickey asked Hansen when they were going to do "the magic math show." Hansen said it was not the right time or place for that discussion. (Tr. 1712)

Keith Kenyon ("Kenyon") was the supervisor in the truck shop and Dickey's first day in the department was January 4, 2016. During a safety meeting that day, Kenyon told the crew they would receive a 30 minute unpaid lunch break, but would not receive morning or afternoon breaks. He told employees to choose a time for their lunch break; Dickey and his work partner chose 11:00 a.m. to 11:30 a.m. The remaining crew chose noon to 12:30 p.m. for lunch. (Tr. 1682, 1688, 1715, 1719, 2000)

On Thursday, January 7, the truck department held a safety meeting at 11:00 a.m. in the break room. Dickey was there eating lunch. Kenyon asked what he could do to help the workers and Dickey replied "you can give us our breaks back." Kenyon replied that he could not do that. (Tr. 1722)

On Thursday, January 14, the truck shop had another safety meeting in the break room at 11:00 a.m. Dickey was again eating lunch in the break room. Later that day Dickey called Union representative Armenta Jr. complaining that Kenyon had twice interrupted his lunch break with his Thursday safety meetings. Armenta, Jr. said that if it occurred once more the Union would talk to Kenyon about the matter. That afternoon, Dickey told Renteria that it was hell in the truck shop because employees were not receiving any breaks and Kenyon was interrupting Dickey's lunch. Renteria told him to file a hostile work environment complaint with human resources. Dickey replied saying he and Armenta Jr. had a plan to deal with the matter the following week. (Tr. 1723-25)

iii. January 15, 2016

Friday, January 15, 2016 was Dickey's scheduled day off. At some point in the early evening Dickey's wife Leslie spoke with Renteria on the telephone about her husband. Dickey was ultimately fired because of what transpired during this telephone conversation which was the subject of contradictory testimony.

1. George Renteria's testimony

On the evening of January 15, Renteria and his wife went to a restaurant, where he drank two beers with dinner, arriving home at about 7:00 p.m. Just after he came home, Leslie Dickey called on his cell phone; the call lasted about 12 minutes. Leslie Dickey was "hysterical" and "very concerned" about her husband, telling Renteria that Dickey was going to kill Kenyon and that she was trying to stop him from leaving the house with a gun. She asked Renteria to speak with Dickey and gave him the phone. Dickey told Renteria he hated Kenyon. Renteria told him to "quit talking shit," that it was his choice to go to the truck shop and to "deal with it." After the phone call, Renteria called Hansen to report the issue, because he "felt it was real." Renteria drank another two beers after speaking with Leslie Dickey; having no more than four beers the entire evening. (R.4; Tr. 1643-54)

2. Leslie Dickey's testimony

Leslie Dickey worked for an ASARCO contractor at a store located inside the Ray mine operations building. She testified that her husband has suffered from atrial fibrillation, a serious and deadly disease, for 20 years.[60] The couple would discuss daily how Dickey's new truck shop schedule and lack of breaks was not working out. (Tr. 1594, 1657-66, 1683)

On January 15 Leslie Dickey arrived home from work at about 4:45 p.m. to find her husband asleep in bed. Leslie woke him up and could tell he was having an atrial fibrillation attack as his face was grayish in color, and he was very lethargic. (Tr. 1667-68)

Sometime between 6:00 and 6:30 p.m. she called Renteria. The Dickey's knew Renteria and his wife personally, and considered them good friends; they had gone camping, fishing, and drinking together. After an exchange of greetings, she told Renteria that Dickey was under so much stress with his new job schedule that he was experiencing frequent atrial fibrillation attacks. She said that, at this rate, Kenyon was going to kill her husband before his scheduled surgery on January 28; she asked Renteria how they could improve the workplace.[61] Renteria told her that she needed to have Dickey go to human resources and file charges against Kenyon for creating a hostile work environment. She said she would do so. At this point in her testimony, the General Counsel asked whether she made any plans for the weekend. Leslie Dickey replied to this question saying that Renteria was slurring his words while they were on the phone, became frustrated, and invited the Dickey's to come over to his house that weekend to talk about it.[62] Leslie Dickey denied handing the telephone to her husband or mentioning a gun during the call, which she estimated lasted 3 to 4 minutes, "maybe longer." She did not call a doctor or 9-1-1 that evening, explaining that Dickey has "little tricks" to end the attack, and has 72 hours before his heart needs to be shocked back into rhythm. (Tr. 1664-72; 1684)

3. Ken Dickey's testimony

On January 15, Ken Dickey had an atrial fibrillation attack at 5:00 p.m. He immediately started taking blood thinners and fell asleep. He "vaguely" remembered seeing his wife that evening, telling her that he was having an "episode" and to leave him alone. Dickey denied speaking with Renteria, saying that he slept through the evening. According to Dickey he has had atrial fibrillation for 20 years, and sleeping can help cure an attack. (Tr. 1726-31)

4. Charles Hansen's testimony

At around 7:00 p.m. on January 15, Hansen received a call Renteria saying he received a telephone call from Leslie Dickey who told him that her husband had a gun and was going to kill Kenyon because Dickey was mad at him regarding issues in the truck shop. Renteria further said that he also spoke with Dickey during the call and told him to "quit talking like that." According

[60] "Atrial fibrillation is an irregular and often rapid heart rate which produces poor blood flow causing the heart's two upper chambers to beat chaotically and irregularly; symptoms include heart palpitations, shortness of breath, and weakness." See, *Schaffer v. Commissioner of Social Security*, 2014 WL 2094315, at *1, fn. 3 (W.D. Pa. 2014) (internal quotation omitted)

[61] Dickey had a medical procedure scheduled on January 28 for his atrial fibrillation (Tr. 1729)

[62] The Dickey's never went to Renteria's house that weekend. (Tr. 1679)

to Hansen, Renteria's demeanor was normal, and his voice that night was clear, "as clear as he always is;" Hansen believed the threat was serious. (Tr. 1597-1607; 1617, 1621)

5. Phil Bidegain's testimony

On the night of January 15, at 8:24 p.m., Phil Bidegain telephoned Renteria to discuss the status of parts that were needed for an essential repair. At the time, Bidegain was working for ASARCO as a maintenance supervisor.[63] Renteria answered; his speech was very slurred and Bidegain believed Renteria was incoherent. Bidegain could not understand what Renteria was saying, and could not get an intelligible answer from him, so he gave up.[64] (Tr. 2051-56)

iv. January 16, 2016

The morning of Saturday, January 16, Deborah Lengel ("Lengel"), Respondent's highest human resources official at the Ray mine, received a call from Hansen who told her about his conversation with Renteria the night before. Lengel told Hansen to call Renteria back, find out "what's going on," and report back to her. Hansen called Renteria to confirm what occurred, and Renteria corroborated what he said the night before. Instead of Hansen reporting back to Lengel, Renteria called her directly. Renteria told Lengel that Leslie Dickey said her husband was going to kill Kenyon. Lengel notified Kenyon that day about the incident, but that Kenyon told her that he had already spoken with Renteria. (Tr. 1555-58, 1580, 1629-30)

That day, at about 1:00 p.m., Dickey received a phone call from Phil Bidegain who asked him "what's going on with your drunk little buddy," referring to Renteria. Bidegain told Dickey that he tried calling Renteria the previous night about a work issue, but that Renteria was so drunk that he could not understand what he was saying and became belligerent, so Bidegain hung up. Dickey testified that Renteria, who he has known for 3 years, has a history of getting drunk, and Dickey knows this because they have been drunk together. (Tr. 1731-33)

v. Dickey's return to work on January 18, 2016

On January 18, Hansen instructed Dickey's supervisors to send him directly to the human resources office upon his arrival. That morning Dickey drove to work with his wife. When they arrived at the mine Dickey started walking towards the truck shop while his wife went to work in the store. On the way to the truck shop Renteria stopped him. Renteria told Dickey his wife had called him on Friday, that he had to do something because he was a supervisor, and that Dickey needed to report to human resources. (Tr. 1618, 1734-36).

Dickey went to the human resources office where Lengel and Hansen were waiting. Hansen told Dickey that a threatening phone call was placed to Renteria and Dickey interrupted him saying that the call did not come from him. Hansen said that perhaps the call came from his wife. Dickey replied questioning how that could be considered a threat and suggested that Renteria was mistaken because he was drunk. Lengel stated that they were investigating the

[63] When he testified, Bidegain was no longer working for ASARCO. (Tr. 2051)
[64] I credit Bidegain's testimony that he told Hansen about his conversation with Renteria sometime within a two week period after the call. (Tr. 2055)

phone call to Renteria and it was alleged that Dickey threatened to kill Keith Kenyon. At this point Dickey started complaining about Kenyon, saying that he took away their breaks and was conducting safety meetings while Dickey was eating his lunch. Hansen told Dickey that his complaints were ridiculous and that he did not want to be receiving calls on Friday nights. Dickey said that his "old lady" called Renteria and that she should not have called him. Hansen told Dickey that this was a blatant threat, and "you don't get to do that." Dickey was dismissed and told to go back to work. At no time during the meeting did Dickey ever deny threatening Kenyon. (Tr. 1571-74, 1599-1600, 1611, 1630-31, 1739-40, 1760; GC. 105)

After the meeting, Lengel and Hansen met with Union officials Manny Armenta, Jr. and Carlos Castillo. During this meeting, Hansen told the Union officials that there was a threat of violence, the word "kill" was used, and such conduct would not be tolerated. He also told them that Renteria claimed to have also spoken with Dickey on the night in question. Hansen informed the Union that the company was still looking into the allegations and Dickey would be suspended pending investigation. (1574-75; GC. 105, p.3)

Dickey, who was now at work in the truck shop, was once again summoned back to human resources. As Dickey was walking towards the office, Armenta Jr. and Castillo met him. They told Dickey that Renteria "threw you under the bus," that his wife had been escorted off the property, and that he was probably going to be suspended. Indeed, Dickey's wife had been escorted from the property. Soon after she arrived to work that morning the safety manager walked her off the property and she drove back home. (Tr. 1673, Tr. 1740-43)

Dickey, Armenta Jr., and Castillo then went to the human resources office where Hansen and Lengel were again waiting. Hansen said that he could not allow anyone to threaten a foreman and that Dickey was suspended pending further investigation. Dickey was given an opportunity to speak, but did not say anything. Safety department members were waiting to escort Dickey to the guard shack. (Tr. 1743-44)

Later that day, Hansen and Lengel met with Renteria, who provided them with a written statement of his telephone conversation with Leslie Dickey. The statement was consistent with what he had already told them occurred.[65] (Tr. 1557-58, 1995-97; R. 4, GC. 106, p.4).

vi. Ken Dickey's termination

On January 20, Lengel held a conference call with Union officials, including Armenta, Jr., regarding the investigation. During the call, Armenta Jr. told Lengel about Leslie Dickey's version of events on the night in question. Armenta Jr. said that what Leslie Dickey actually told Renteria was that her husband was scheduled for heart surgery and that Kenyon was going to end up killing Dickey by giving him a heart attack because of all the stress. (Tr. 914, 1543-44, 1581; GC. 106)

According to Hansen, he was the one who made the ultimate decision to fire Dickey, after discussing the matter with Lengel and Kotraba, who all agreed. On January 21, Dickey received a call from Lengel telling him that he was terminated. That same day, Lengel sent him

[65] At some point Renteria confirmed to Hansen he only had two beers before his call with Leslie Dickey. (Tr. 1606)

a letter confirming his discharge. The Union filed a grievance over the termination and the parties had a grievance meeting on February 9, 2016. During the meeting Armenta Jr. argued that Renteria was drunk the night in question and there was therefore a credibility issue.[66] Armenta Jr. explained Leslie Dickey's version of events and also told the company that Bidegain spoke to Renteria that night on the telephone and Renteria was incoherent.[67] Hansen replied saying that Renteria was "clear" when they spoke that night, and there was no confusion as to what was said. Hansen went on to say that he was very specific when he asked with both Renteria and Dickey what occurred, and that he believed Dickey made the statements attributed to him by Renteria. On February 17, 2016, Respondent denied the grievance. (Tr. 1538-39, 1563, 1581-83, 1595-96, 1601, 1611, 1745; GC. 108-110)

b. Analysis

i. General Counsel's prima facie case

I find that the General Counsel has made a prima facie case showing that Dickey's union and protected concerted activity was a motivating factor in his discharge. Dickey was involved in union and concerted activity when he confronted Hymas in October 2016, in the presence of his coworkers, saying that an agreement was needed when Hymas urged employees to consent to 12-hour shifts. As the parties were still bargaining, in essence Dickey was telling Hymas that the issue of 12-hour shifts must be bargained with the Union. See, *NLRB v. City Disposal Systems Inc.*, 465 U.S. 822, 832 (1984) ("A lone employee's invocation of a right grounded in his collective-bargaining agreement is, therefore, a concerted activity in a very real sense"); *Wyndham Resort Development Corp.*, 356 NLRB 765, 766 (2011) (A single "employee who protests publicly in a group meeting is engaged in initiating group action."). Hansen, one of the decision makers in Dickey's discharge, was present during this confrontation and therefore witnessed Dickey's protected conduct first hand.[68] Finally, the various violations found herein are sufficient to show a general animus. *Dynasteel Corp.*, 346 NLRB 86, 88 (2005) ("The Respondent's numerous 8(a)(1) violations provide evidence of its anti-union animus.").

ii. Respondent has shown that it would have terminated Dickey notwithstanding his protected conduct

With the General Counsel having presented a prima facie case of discrimination, the burden of persuasion shifts to Respondent to show it would have taken the same action against Dickey even absent his protected activity. I find that Respondent has met this burden.

Respondent was presented with evidence that Dickey threatened to kill Kenyon. Renteria's recitation of what occurred was consistent each time he spoke with Hansen or Lengel, and was consistent with his written statement. After being told about the allegation that he

[66] Armenta also questioned why the police were not called. (GC. 108)
[67] In her notes, Lengel mistakenly calls Phil Bidegain "Bill." (Tr. 1583)
[68] It is questionable whether, under these circumstances, knowledge of Dickey filing charges with the Board should be imputed to Respondent . See *Music Express East, Inc.*, 340 NLRB 1063, 1063-64 (2003). However, even assuming such knowledge, it ultimately does not change my analysis or finding that Respondent has shown it would have fired Dickey notwithstanding his protected conduct.

threatened to kill Kenyon, Dickey was twice provided an opportunity to present his version of what occurred; both times he did not deny making the threat. Faced with these circumstances, I believe that Respondent's decision to terminate Dickey was reasonable. As noted by the district court in *Moore v. Christus Health Services Texas*, 2011 WL 1533460, at *2 (E.D. Tex. 2011), "whether or not the plaintiff directed an implied threat to kill coworkers with whom she was having a dispute directly to their faces, or whether she spoke indirectly and only to another worker, or whether she was not serious when making such statement is beside the point. Making such a statement in any context provided the [employer] with a legitimate, nondiscriminatory reason for plaintiff's discharge, and plaintiff has failed altogether to show that such reason was mere pretext for . . . discrimination."

iii. The General Counsel has not shown pretext

Both the General Counsel and the Union claim that Respondent's purported reason for firing Dickey is pretext: (1) arguing that Respondent deviated from its progressive disciplinary policy, (2) pointing to the timing of Dickey's discharge, and (3) challenging the sufficiency of the company's investigation. Regarding pretext, although it arose in the context of a Title VII case, where an employee was fired for expressing a desire to kill her new supervisor, the Seventh Circuit's instructions in *Coleman v. Donahoe*, 667 F.3d 835, 852 (7th Cir. 2012), are equally applicable here:

> To show this reason is pretextual, [a party] must present evidence suggesting that the employer is dissembling. . . . It is not the court's concern that an employer may be wrong about its employee's performance, or may be too hard on its employee. Rather, the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie. . . . [I]f the stated reason, even if actually present to the mind of the employer, wasn't what induced him to take the challenged employment action, it was a pretext. (internal quotations omitted)

I find that the evidence does not support a finding of pretext. Concerning Respondent's alleged deviation from its progressive disciplinary policy, neither the government nor the Union cite any record evidence showing that ASARCO, in fact, had a progressive disciplinary policy with specific individual steps that must be followed before termination. Indeed, neither the BLA nor the Ray Mine supplement specifically enumerate, or discuss, any individual steps of a progressive disciplinary policy. As such, I find this argument is a non sequitur, and does not show pretext.

Regarding timing, under the circumstances presented, I find that the timing of Dickey's discharge is not suspect. This is not a case where a discharge, in relation to the protected conduct, is so precipitous that the animus is "stunningly obvious." *NLRB v. Novelty Products Co.,* 424 F.2d 748, 750 (2d Cir. 1970) (timing of mass layoff, coming one week after the union's organizing drive started, and within one day of the union's request for recognition, was more than sufficient to support a violation). Indeed, Dickey's confrontation with Hymas occurred almost three months before he was discharged.[69] See *Snap-On Tools, Inc.*, 342 NLRB 5, 9 (2004) (discipline issued two months after protected activity was not unlawful as it was remote

[69] There is no evidence any of the decision makers knew of Dickey's alleged concerted activities in December 2015.

in time from employee's union activity and was issued proximate to the events for which employee was purportedly disciplined). Moreover, it was only after Renteria reported the threat to kill Kenyon that Dickey appeared on Respondent's radar. Given this intervening event, the timing does not support an inference that his discharge was unlawfully motivated. *Pacesetter Corp.*, 307 NLRB 514, 521-522 (1992) (General Counsel's prima facie case was overridden by a critical intervening event, "thus plausibly triggering a sufficient innocent reason" for the employees termination). That is especially true here, where the General Counsel does not claim that Renteria was motivated by animus when he reported the threat to his superiors. *Cf. Allegheny Pepsi-Cola Bottling Co. v. NLRB*, 312 F.2d 529, 531 (3d Cir. 1962) (violation where supervisor's unlawfully motivated report was the cause of employee's discharge, even though the ultimate decision maker was not motivated by anti-union animus); *Alchris Corp.*, 301 NLRB 182, 191 (1991) ("A decision to discharge an employee based on the unlawfully motivated recommendation of a supervisor violates the Act regardless of the motivation of the decision-maker who acted on that recommendation.").

Finally, both the General Counsel and the Union argue there were faults in the investigation and chastise Respondent for not interviewing Leslie Dickey or Bidegain. While the investigation was less than perfect, I find that it was not so inadequate under the circumstances to show pretext. Hansen and Lengel both spoke with Renteria separately, and his written statement confirmed what he had previously told them. Before he was fired, Dickey was twice called into human resources and given an opportunity to deny threatening to kill Kenyon, but did not do so. This is not a situation where an employee was fired before being given an opportunity to explain his actions.

It is true that Respondent did not interview Leslie Dickey or Bidegain as part of their investigation. However, before Dickey was fired, the Union informed Respondent of his wife's version of events. Thus Respondent knew of the competing versions of what was said during the telephone call with Renteria before deciding to fire Dickey and it is unclear what else the company would have learned from Leslie Dickey that the Union had not already told them. As for not interviewing Bidegain, the fact Renteria was unintelligible at 8:24 p.m. does not necessarily mean that the same was true when he spoke with Leslie Dickey one or two hours earlier.[70] Also, I believe that Hansen already suspected Renteria was drinking the night in question, and thus asked Renteria to confirm how much alcohol he consumed. That being said, Renteria's version was consistent every time he spoke with either Hansen or Lengel and was also consistent with his written statement. Moreover, even by Leslie Dickey's version of events, Renteria was able to understand her complaint about Kenyon articulate a plan of action – allegedly telling her to file a complaint with human resources. Thus I find Respondent's failure to more fully explore the extent of Renteria's drinking that evening is not evidence of pretext.

Under these circumstances, I find the investigation was not so inadequate as to demonstrate unlawful motive. *Mission Foods*, 350 NLRB 336, 350 (2007) (employer's investigation, while less than perfect, was not so indefensible under the circumstances to show pretext); *Gaylord Hospital*, 359 NLRB 1266, 1281 (2013). As such, I find that ASARCO met

[70] Leslie Dickey testified she spoke with Renteria sometime between 6:00 to 6:30 p.m. (Tr. 1669) While Renteria testified that the conversation occurred around 7:00 to 7:15 p.m., his written statement says it occurred at 6:55 p.m. (Tr. 1648, R. 4)

its rebuttal burden of proving it would have terminated Dickey even if he had not engaged in protected conduct. In the end, the ultimate burden to prove a violation rests upon the General Counsel, and with respect to Dickey's termination I find the General Counsel has fallen short. As such, I recommend the allegations involving Ken Dickey's discharge be dismissed.

C. Alleged 8(a)(5) Violations

1. Respondent's refusal to provide information

While a union's request for bargaining unit data, such as wage and benefit information, is considered presumptively relevant, a request for non-bargaining unit information such as subcontracting costs and related information is not. *Sara Lee Bakery Group., Inc. v. NLRB*, 514 F.3d 422, 430 (5th Cir. 2008); *Ethicon, A Johnson & Johnson Co.*, 360 NLRB 827, 831 (2014) (information about subcontracting agreements are not presumptively relevant). For information that is not presumptively relevant the union has the initial burden of establishing relevancy before the employer must comply.[71] *Sara Lee Bakery Group*, 514 F.3d at 430.

The standard used to show relevance is a "liberal discovery-type standard." Id. The "union need only be 'acting upon the probability that the desired information was relevant and that it would be of some use to the union in carrying out its statutory duties and responsibilities.'" Id at 430-431 (quoting *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 437 (1967) To show a violation: (1) the union must show, at the time of the information request, that it articulated a legitimate purpose for seeking the information; and (2) the information it requested bears a logical relationship to a legitimate union purpose. Id. at 431. That being said, the Board has held that, when the requested information is not presumptively relevant, a claim that the information is needed to make "reasonable wage proposals" or "to bargain intelligently" is insufficient to establish relevance. *F.A. Bartlett Tree Expert Co.*, 316 NLRB 1312 (1995).

a. Request for information on contracting out bargaining unit work

i. Facts

On August 26, 2015, Robert La Venture ("La Venture"), the chairman of the Union's negotiating committee, sent Respondent a letter seeking information regarding the contracting out of bargaining unit work, "in order to understand ASARCO's current bargaining position." Specifically the letter asked ASARCO provide the following information: (GC. 73)

1. A list of all contractors at all locations, categorized by location and including all work currently contracted or previously contracted over the last 6 months, including:
    a. the duration of the project;
    b. the name/ identity of the contractor;
    c. the number of contractors, or employees of contractors, that were brought to the worksite;

[71] When the requested information is presumptively relevant, it is the employer who has the burden of proving lack of relevance. *National Grid USA Service Co., Inc.*, 348 NLRB 1235, 1243 (2006).

d. a description of the project being completed;
e. the total cost of the contractor for the project
f. whether there were any bargaining unit employees capable of performing the work, and if so the reason ASARCO decided to use a contractor instead of unit employees;
g. Whether the company informed the local's Bargaining Unit Work Committee before the work was given to a contractor; and

2. Whether ASARCO had any plans for using additional contractors, and if so:
a. The project(s) the contractors would be working on;
b. The expected duration of the project(s)
c. The number of contractors needed for the project(s);
d. Whether the project(s) have already been put out for bid, or awarded to a specific contractor(s);
e. The contractor who will be working on the project(s); and
f. The compensation for the contractor(s).

Respondent's Director of Human Resources, Stacy Sinele ("Sinele") replied, via email dated September 25, 2015, stating that ASARCO had not made any bargaining proposals regarding the issue, and that the parties had already tentatively agreed to a provision regarding subcontracting/contracting out unit work. Therefore, Sinele asked La Venture to identify the "bargaining position" referred to in his letter. La Venture replied stating that the Union wanted to understand the extent of ASARCO's recent usage of contractors. (R. 41)

On November 4, 2015, La Venture sent a letter to Respondent noting that, among other things, the information requested had not been produced, and again requesting the information. On December 14, the parties had a big-table bargaining session where the Union asked when the company was going to respond to the Union's outstanding information request. Respondent's counsel acknowledged receiving the request, but did not say anything else. Respondent never produced information. (Tr. 1325-27;GC. 76)

Nicholas Schafer ("Schafer") testified on behalf of the Union regarding the information request. Schafer works in the Union's benefits and research department, and was assigned to work on the ASARCO negotiations, attending many of the bargaining sessions and internal Union strategy meetings. His role included determining whether the Union had sufficient information to understand the costs associated with proposals, and if not to formally request the needed information. Schafer was the one who actually drafted the August 26 information request. According to Schafer, amounts paid to outside contractors are part of labor costs which go into the cost of producing a pound of copper. Therefore, The Union needed this information to determine the company's total labor costs generally, and the amount of the total costs specifically attributed to using outside contractors in comparison to employee wages. Schafer testified that the company's failure to respond to this information requests impacted the Union's ability to make wage proposals and with this information the Union would have been able to make more intelligent and perhaps different wage offers. Without a complete picture of the total labor costs, according to Schafer, the Union would be "basically throwing a dart at a dart board" when making a wage proposal which in turn affected other economic items, such as insurance, benefits, and retirement plans. (Tr. 1309-1314, 1322-25, 1328)

ii. Analysis

The information requested about subcontracting was not presumptively relevant. *Ethicon, A Johnson & Johnson Co.*, 360 NLRB at 831. Therefore, it was incumbent upon the General Counsel to show relevance – and they have failed to do so. The reasons advanced by both the General Counsel and the Union amount to nothing more than a generalized need to bargain intelligently. That is especially true here, where the Union had already signed a tentative agreement on subcontracting in September 2014, nearly a year before the information request was made. (R. 2, pp. 92-97)

Finally, this is not a situation where, during the course of bargaining, the employer consistently maintained that certain concessions were necessary to improve its competitiveness, and the union responded by requesting information to evaluate the accuracy of the employer's claim. *KLB Industries, Inc.*, 357 NLRB 127, 128 (2011), enfd. 700 F.3d 551 (D.C. Cir. 2012); *Caldwell Mfg, Co.*, 346 NLRB 1159 (2006). While Respondent generally expressed its intent on controlling labor costs, there is no evidence that Respondent asserted a competitive disadvantage, or that the union's information request was made to evaluate the accuracy of these claims. As such, I recommend this allegation be dismissed.

b. <u>October 1, November 2, and November 4, 2015, information request on the usual, customary, and reasonable reimbursement rates</u>

i. Facts

On October 1, 2015, the parties held a health care sub-committee meeting in Tucson, Arizona. Various individuals were present including Schafer and Sinele. Two items were discussed at this meeting: changes to the underlying summary plan documents; and the usual, customary, and reasonable ("UCR") reimbursements rates under Respondent's health plan. (Tr. 1338-40, 2276)

Health insurance carriers reimburse physicians based upon the historical charges of individual physicians and their medical colleagues at some period in the recent past, and refer to this as the usual, customary, and reasonable reimbursement. Sylvia A. Law Barry, *Negotiating Physicians' Fees: Individual Patients or Society? (A Case Study in Federalism)*, 61 N.Y.U. L. Rev. 1, 12 (1986). Generally insurance programs pay the lesser of the physicians actual bill; the amount the physician customarily charges for that procedure – as defined by the median of actual charges; or the prevailing charge in the community – defined as some percentile of customary charges within a given medical specialty and geographic locality. Id; *see also*, *American Medical Association v. United Healthcare Corp.*, 2001 WL 863561, at *1 (S.D.N.Y. 2001) ("The UCR amount is determined by considering the nature of the service provided and the typical charge for such service by other doctors in the same or similar geographic area.").

In April 2015 the parties entered a tentative agreement regarding health insurance, which was to be provided through a preferred provider organization (PPO). For services from providers within the PPO (in-network), employees would pay 20% of the costs, calculated according to rates negotiated with the network providers. For out-of-network providers,

Respondent would pay 70% of the UCR, leaving employees to pay for 30% of the bill.[72] While the parties had TA'd an overall benefits proposal, they had yet to reach agreement on the underlying summary plan descriptions, which are specifically incorporated into the contract. (1344-45; R. 2, p. 125; GC. 4, p. 101)

At the October 1 meeting, as the parties discussed UCR rates, Respondent asked the Union for clarification regarding an earlier information request into UCR rates.[73] The Union stated that they wanted the UCR reimbursements for all procedures within the relevant geographic areas. Using a shared computer, the parties logged onto the website for Fair Health, the database used by Respondent to determine UCR rates. Schafer illustrated to Respondent how the Union could not access all the reimbursable procedures using the Fair Health website, at most being able to request 15 procedures, and could not locate the different reimbursement rates between geographical areas. (Tr. 1340-42, 2275; GC. 68)

On November 2, 2015, the Union sent Respondent a letter requesting information on UCR reimbursements. The Union asked the company provide: (1) the estimated UCR reimbursements for all procedures within the relevant geographic area (e.g., Hayden, Amarillo, etc); and (2) the actual mathematical formula used to determine the UCR, along with the inputs and how those inputs are determined. The Union again asked for this information in a letter to Respondent on November 4, two days later. (GC. 74, 76)

According to the Union, the company never replied to this information request. The Union stated that it needed this information because the UCR portions of both the dental and health summary plan descriptions were open items. Schafer described the information as "very important" explaining that 10% of total claims by employees involved out-of-network providers, which was about $2.4 million in 2012. (Tr. 1342-45)

Respondent claims that it fully replied to the information request when Sinele showed the Union how to obtain the UCR rates for procedures within each relevant geographic area on the Fair Health website. ASARCO also claims that it previously provided the Union with the information requested regarding the formula used, along with the inputs into the formula. Respondent first points to a letter dated July 24, 2015, which stated:

> The 90th percentile of UCR for non-network reimbursements is used. The UCR amount is used as the "allowed amount" and then applied to the appropriate deductible, coinsurance, or copay based on the out of network defined in the plan. Providers are reimbursed based on the "allowed amount" less any member responsibility (deductible, coinsurance or copay). (GC. 38, 99)

[72] Under the BLA employees paid 10% for in-network services, and 20% of the bill for out of network costs. (R. 2, p. 125; Tr. 1345)

[73] The Union made an information request on July 1, 2015 regarding UCR rates, which Respondent replied to on July 24. (GC. 68, 99) However, the Union still had questions regarding UCR rates and believed the company had not fully replied to the information request. (Tr. 1339-46)

Respondent next refers to an August 26, 2015 letter from Respondent's attorney to the Union,[74] which said that that the UCR is

> determined by using a methodology based on actual charges by physicians, including specialists, in the geographic areas where the procedures are furnished. The data is gathered from third party administrators, commercial insurance companies and self-administered employee plans. . . . The combined data is used to establish the reasonable and customary charge for the different percentiles. The customary fee of your benefit plan for each procedure is at the 90th percentile. This means at least 90 out of every 100 charges received are equal to or below the fee allowance. (GC. 72)

Finally, Respondent asserts that it had no duty to respond the information request, as this, along with other requests, were purely tactical, and submitted solely for the purpose of delay.

ii. Analysis

Amounts employees pay for deductibles and out of pocket expenses under employer sponsored insurance coverage are mandatory subjects of bargaining. *Athey Products Corp.*, 282 NLRB 203, 205 (1986). And a union's information requests involving employee costs for out of pocket expenses are presumptively relevant. *Mathews Readymix, Inc.*, 324 NLRB 1005, 1009 (1997). Because the ultimate amount ASARCO employees pay for using out-of-network providers is based, in part, upon the UCR reimbursement rates, I find that the information requested by the Union is presumptively relevant. As such, Respondent has the burden of proving a lack of relevance. *National Grid USA Service Co., Inc.*, 348 NLRB 1235, 1243 (2006). They have not done so.

I disagree with Respondent's contention that the information request concerning UCR reimbursement was submitted solely for the purposes of delay. The Union had continually sought UCR reimbursement information since July 2015, well before Respondent declared impasse. And, the fact the parties had already TA'd a benefits provision setting forth reimbursements as a percentage of UCR's does not make the request somehow irrelevant, as the specific summary plan descriptions were still being negotiated. Moreover, the Board has noted the fact a complete contract has been negotiated "without the requested data does not render the information not relevant." *Castle Hill Health Care Ctr.*, 355 NLRB 1156, 1180 (2010). A union "is entitled to information not only to assist in contract negotiations, but in connection with a full range of statutory duties." Id. at fn. 35. Trying to understand the ultimate out of pocket expenses employees will bear for visiting out-of-network providers certainly falls within this range of duties.

Once a union makes a good faith demand for relevant information, the employer must make a diligent effort to provide the information in a timely manner and useful form. *Detroit Newspaper Agency*, 317 NLRB 1071, 1072 (1995) (employer must provide relevant information reasonably promptly in a useful form); *Amersig Graphics, Inc.*, 334 NLRB 880, 885 (2001)

[74] In the August 18 letter, Respondent also told the Union that the national database "is comprised of nearly 350 million current charges for approximately 200 geographic zip code groupings." (GC. 38, p.2)

(employer must respond to information request in a timely manner). The Board has also held that, where the information requested by a union is in the possession of third parties with whom an employer has a relationship, the employer is obligated to make a good-faith, reasonable effort to obtain the information from such parties. *See, e.g.*, *Garcia Trucking Services, Inc.*, 342 NLRB 764, fn. 1, (2004) (citing *Pittston Coal Group, Inc.*, 334 NLRB 690, 692-93 (2001)). Here, Respondent neither provided the Union with the information requested, nor did Respondent show that it made any attempt, let alone a good faith attempt, to get the requested information from Fair Health or anyone else.

As for the information regarding procedure reimbursements, by geographic area, Respondent's claim that Sinele showed the Union how to obtain this information from the Fair Health website is not a defense, as I credit Shafer's testimony that the Union could only access, at most, 15 procedures from the website. Moreover, it was Respondent's duty to actually compile the information in a useful form, and provide it to the Union in a timely manner. The duty to provide relevant data is not excused by the fact the information may be obtained by the Union elsewhere. *ASARCO, Inc. v. NLRB*, 805 F.2d 194, 198 (6th Cir. 1986); *Castle Hill Health Care Center*, 355 NLRB 1156, 1183 (2010).

I also find that Respondent did not previously provide the Union with the information it sought regarding the UCR formula, and the inputs into that formula. Respondent's reply was general in nature, giving an overview of the UCR data, while it is clear from the information requests that the Union was seeking specifics. Respondent's answer was the equivalent saying that, for a particular math equation, the answer is the number four, and it was derived by taking the numerator and dividing it by the denominator. While it provides the answer, it does not provide the inputs, and there are multiple combinations where a numerator divided by a denominator could equal four. What the Union was seeking was the answer, along with the numerator and the denominator to confirm that the answer is correct.[75] Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act by failing to provide the Union with the information requested.

c. Union's November 4, 2015, information request

i. Facts

On November 4, the Union sent a letter to Respondent requesting, in part, the following information: (1) a description of how the copper price bonus impacts ASARCO's cost of production for one pound of copper; (2) a breakdown showing the cost of production from 2013 to the present; (3) the plan documents, including summary plan description, covering the retiree health program; (4) an explanation of how Respondent foresees an increase in costs beyond the status quo for retiree healthcare, including the costs of employees hired after June 30, 2011; (5) the total cost savings produced by limiting

[75] The Fair Health UCR database was created as the result of a settlement between United Health, which operated a business unit called Ingenix that was the primary source of UCR data, and the New York Attorney General. Tania E. Yusaf, *The Out-of-Network Reimbursement System Is Out of Control: An Analysis of Payment by Managed Care Organizations to Out-of-Network Providers*, 14 Quinnipiac Health L.J. 85, 112 (2010). The Attorney General investigation found that the Ingenix UCR database was manipulated to minimize procedure rates and insurance company payments, thereby requiring consumers to pay higher amounts for out of network procedures. Id. 107-109. Given the history of alleged manipulation of UCR data, the Union's request for the inputs into the Fair Health UCR formula is certainly reasonable.

retiree healthcare eligibility to pre-Medicare individuals, including the costs of employees hired after June 30, 2011; (6) the costs attributed to eligibility for retiree healthcare to all employees hired after June 30, 2011, including data supporting Respondent's claim the cost of covering those employees upon retirement would be "huge;" and (7) notes detailing and explaining the assumptions, calculations and methods used by the actuaries (Milliman) in determining their estimates regarding retiree healthcare, which was given to the Union on May 14, 2015. The company never replied to the information request, claiming it had previously provided the information and that the information request was made for purposes of delay. (Tr. 484-85, 1321; GC. 76)

ii. Analysis

Notwithstanding Respondent's impasse declaration on October 29, the Union was still formulating and presenting bargaining proposals on the copper price bonus and future retiree healthcare, and in fact presented proposals on both issues in December 2015. Therefore, I reject Respondent's contention that the November 4 information request was submitted solely for the purpose of delay. *NLRB v. McClatchy Newspapers, Inc.*, 964 F.2d 1153, 1173 (D.C. Cir. 1992) (noting that a legal impasse may end suddenly). In the face of ASARCO's impasse declaration, I find it reasonable for the Union to seek updated information to present financial packages in attempt to break the impasse. *Omaha World-Herald*, 357 NLRB 1870, 1885 (2011) (impasse can end suddenly with any changed condition or circumstance that renews the possibility of fruitful discussion). Therefore, I find that the information request was not submitted simply for purpose of delay. Moreover, Respondent's generalized claim that it previously presented responsive information, and therefore did not have to reply, is not a defense. At a minimum, ASARCO was required to either provide the information it had or to refer the Union "specifically to any information that the Respondent might previously have provided." *The Boeing Co.*, 364 NLRB No. 24, slip op. at 2 (2016). Silence is not an acceptable answer, and in itself constitutes a violation. *Graymont PA, Inc.*, 364 NLRB No. 37, slip op. at 6-7, (2016).

1. Copper Price Bonus information request

The Final Offer provides employees a copper price bonus of $1,242 once the average quarterly price of copper reaches $2.70 per pound. Thereafter, the bonus increases for every 10 cent increase in the average price of copper and is capped at $4.00 per pound with a bonus of $2,870. Under the expired BLA, employees received a bonus when the average copper price was as low as $1.60 per pound. The new bonus structure results in an annual reduction in pay of between $1,080 to $4,536 per employee when the price of copper is between $1.60 and $2.69.

Respondent asserts it had already provided the Union with the information it sought, pointing to a February 26, 2015, letter from its attorney to the Union containing various attachments. The attachments included a quarterly breakdown of copper price bonus payments, by facility, along with Respondent's total production from 2011 through 2014. Using these attachments, the company asserts the Union could calculate the per pound cost of the copper price bonus. Indeed, adding the quarterly figures and dividing by total production shows that the copper price bonus cost 5.5 cents per pound of production in 2011, 4.1 cents in 2012, 3.4 cents in 2013 and 2.8 cents in 2014. (Tr. 2246; R. 32, R. 32p. 26-28)

Respondent also asserts that it provided the Union with sufficient information to calculate the per pound impact of the copper price bonus for the first three quarters of 2015, citing emails sent by Sinele to the Union. However, Respondent is mistaken. (R. 34, 35, and U. 8)

These emails only contain production information for May, June, and July 2015. Thus the Union could not independently calculate the effects of the bonus for the first three quarters – January through September – of 2015. Because Respondent neither supplied all the information requested, nor specifically referred the Union to information previously provided, I find ASARCO violated Section 8(a)(1) and (5) of the Act as alleged.[76]

2. Breakeven cost of production

The November 4 information request also asked Respondent to provide a breakdown showing the breakeven cost of production from 2013 to the present. Respondent argues that it had already provided the Union with the information it requested.[77] Indeed, Respondent had previously provided the Union with information regarding the company's breakeven cost of production for 2013, for January through June 2014, and for January through July 2015.[78] (R. 37, p.9; R. 34, p.3) However, even Respondent admits there are gaps in the production. Accordingly, I find ASARCO violated Section 8(a)(1) and (5) by not providing the information requested for the entire year of 2014, and for August through October 2015.

3. Retiree Healthcare Information

Former bargaining unit members who are currently retired are not unit employees, "indeed they are not employees under the Act." *FirstEnergy Generation LLC.*, 362 NLRB No. 73, slip. op. at 5 (2015) (citing *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 176 (1971). However, future retirement benefits of currently active employees are mandatory subjects of bargaining as they are "part and parcel of their overall compensation." *Pittsburgh Plate Glass Co.*, 404 U.S. at 180. Here, because the parties were bargaining over the future retirement benefits of current employees, the information sought by the Union was presumptively relevant. Id.

a. Plan documents and summary plan descriptions

Respondent asserts that it provided the Union with the only summary plan description it possessed regarding the retiree health program, and therefore did not have to further reply to the Union's November 2015 information request. The evidence shows that in February 2015, ASARCO provided the Union with a summary plan description for hourly employees at Ray, that was effective July 2002 through June 2005. (GC. 111, p. 54) However, Respondent had an obligation to obtain the necessary current responsive information and provide it to the Union. *Beyerl Chevrolet, Inc.*, 221 NLRB 710, 721 (1975) (when a union seeks relevant benefit plan

[76] The Union's information request was presumptively relevant. *Lasher Service Corp.*, 332 NLRB 834, 839 (2000) (request seeking possible compensation if union agreed to proposed bonus is presumptively relevant)
[77] The Union does not contest the relevance of the information sought.
[78] I do not credit Armenta Jr.'s testimony that he did not receive the August 26 email with the information. (Tr. 2328; R. 34)

information, "it is no answer for the employer who has not supplied that information to claim that it does not 'have' it. The response to this is that if it does not have it should obtain it."). Relying on a 10-year old document is insufficient when it is undisputed that Respondent was providing retiree health insurance at the time the information request was made. At a minimum, Respondent should have provided the Union with updated and current information covering the topics set forth in the 2002 summary plan description.[79] By not doing so, Respondent violated Section 8(a)(1) and (5) of the Act by failing to do so.

b. notes, calculations and methods used by Milliman

In a case such this one, involving a "request for a calculation with many opportunities for error, and varying assumptions, a union is entitled to have a calculation from the employer so that it can verify the validity of its own calculation." *National Extrusion & Mfg. Co.*, 357 NLRB 127, 159 (2011). At a minimum, Respondent was "obligated to make a good-faith, reasonable effort to obtain the information from" the Milliman actuaries. See, e.g., *Garcia Trucking Services, Inc.*, 342 NLRB 764, fn. 1, (2004) (citing *Pittston Coal Group, Inc.*, 334 NLRB 690, 692-93 (2001)). Indeed, it appears Milliman had signed a release allowing certain of its information to be distributed to the Union. (R. 36, p. 14) Because the information was not provided, and there is no evidence the company even attempted to obtain the calculations from Milliman, Respondent violated Section 8(a)(1) and (5) of the Act.[80]

c. The remaining information requests

Claiming it previously responded to the Union's other information requests regarding costs of future retiree healthcare, Respondent points to documents it provided in May 2015. However, the information provided excluded employees hired after June 30, 2011 from the various assumptions. (GC. 111, p. 23-24) And when material was provided for employees hired after June 30, 2011, the information was a "very rough" estimate, that assumed all the "employees are male."[81] (GC. 36, p. 14) Providing a "very rough" estimate that includes incorrect assumptions, is hardly sufficient. As such, I find a violation as alleged.

2. Alleged direct dealing and unilateral change in the shovel & drill department in September 2015

a. Facts

The Ray Complex shovel and drill department employs boilermakers (welders) and mechanics who historically bid for their work schedules by seniority twice a year. As a result of a June 2015 bid, Carlos "Cipi" Castillo ("Castillo"), an apprentice mechanic in the shovel and

[79] For example, the 2002 plan description states that individuals will pay no more than $20 per examination for vision care. (GC. 111, p. 91) Certainly Respondent knew how much individuals paid for vision care exams in 2015, and should have provided that information to the Union.

[80] As noted below, whatever information Respondent actually provided the Union either did not include employees hired after June 30, 2011, or was a "very rough" estimate assuming only men were employed.

[81] A review of the email relied upon by Respondent in GC. 38 shows that it relies upon the same "very rough" estimate and failed assumptions as GC. 36; Respondent's workforce includes both men and women.

drill shop, was working Monday through Friday, from 7:00 a.m. to 3:00 p.m., also known as the "A" shift. Castillo was also an officer for Steelworkers Local 915. (Tr. 900-911, 2020-21)

On about September 13, 2015, day-pay supervisor Ken Dickey told Castillo that he had to bid on a new work shift, consisting of a rotating schedule, effective September 20.[82] After the new bid, Castillo worked a rotating schedule: seven days on the "B" shift, (from 3:00 a.m. to 11:00 p.m.) then two days off, and eight days on the "A" shift (from 7:00 a.m. to 3:00 p.m.) then four days off. Before this change, only journeymen were working rotating schedules; after the bid the apprentices were also going to work rotating schedules. (Tr. 904-08, 2033)

Castillo estimates that anywhere from 40-60 employees in the shovel and drill department were affected by the rebid. In September 2015, after the shift change occurred, Castillo went to a Union meeting where he discussed the change. The Union was not notified before the new bid or about the new work schedules for apprentices. Armenta Jr. learned of the change from Castillo and protested to Respondent, but was told the changes were made because they were short of people and it was in the best interest of the company. (Tr. 906, 909-13, 1287-89)

Before the rebid occurred, on August 27, general maintenance supervisor William Tower ("Tower") told employees during a safety meeting that there was going to be a cutback, and it was "more than likely probably" going to be a rebid. About 40 employees were present during this meeting, including Union stewards Michael Real ("Real") and Adrian Lopez. (Tr. 2025, 2034; R. 15)

At the time, there were three apprentices working in the shovel and drill department, including Castillo. Tower felt that the apprentices needed the experience of working rotating shifts, because journeymen worked these shifts. Therefore, on a date after the safety meeting but before the rebid, he had a discussion with Real in his office. According to Tower, he told Real "I'd sure like to put the apprentices on shift work to get them the experience," and Real replied "[y]es, you can do that, but . . . they still have to be accompanied by a journeyman," as they were still apprentices. According to Tower, the bidding then moved forward. (Tr. 2033-35)

b. Analysis

Employee work schedules are mandatory subjects of bargaining, and an employer is obligated to consult and negotiate with the union before implementing any changes. *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 902-04 (2000) (unilateral change resulting in salesmen starting their workday 15 minutes earlier was material and violated Section 8(a)(5), as did change requiring merchandisers to work on Saturdays); *NLRB v. Henry Vogt Machine Co.*, 718 F.2d 802, 812 (6th Cir. 1983) (employer violates Section 8(a)(5) by altering wages, hours, and working conditions without first consulting and negotiating with its employees' bargaining representative). Notice of a contemplated unilateral change in employee working conditions must be formally given. *Henry Vogt Machine Co.*, 718 F.2d at 812. "[C]onjecture or rumor is not an adequate substitute for an employer's formal notice to a union." Id. (internal quotations omitted). And notice must be given to a union agent authorized for this purpose. *California Portland Cement Co. v. NLRB*, 19 Fed.App'x 683, 684–85 (9th Cir. 2001) (enforcing Board's

[82] I credit Castillo testimony over that of Dickey's as to what occurred.

finding that notice given to union steward was inadequate as the steward was not the union's agent for purposes of receiving notice of unilateral changes in job duties).

Here, Respondent failed to consult and negotiate with the Union before changing its established practice of bidding work schedules in June and December, and therefore violated Section 8(a)(5) of the Act by implementing the September 2015 work bid. As a defense, Respondent notes that Tower spoke to employees at the safety meeting that was attended by two Union stewards about the reduction in force and the potential need to rebid the schedule. However, telling employees that it is "probably likely" a new shift bid will occur is simply conjecture and does not constitute adequate notice. *Henry Vogt Machine Co.*, 718 F.2d at 812; see also, *Southern California Edison Co.*, 284 NLRB 1205, 1213 (1987), enfd. 852 F.2d 572 (9th Cir 1988) (unnecessary to decide whether steward was agent of union for purposes of receiving notice of unilateral change, as notice was not clear and unequivocal). Tower did not give the Union clear and unequivocal notice of a change in working conditions by telling a steward he would like to put the apprentices on shift work. *Southern California Edison*, 284 NLRB at 1213. Moreover, Respondent has not shown that the steward was an agent for purposes of receipt of notices of proposed unilateral changes. *California Portland Cement Co.*, 330 NLRB 144, 144 (1999), enfd. 19 Fed.App'x 683 (9th Cir. 2001). Accordingly, I find that the bid and subsequent shift change constitutes an unlawful unilateral change.

Finally, by bypassing the Union and going directly to employees to have them bid on their new shifts in September 2015, Respondent also engaged in direct dealing. *Northwest Graphics, Inc.*, 343 NLRB 84, fn. 1, 93 (2004) (employer engaged in direct dealing by bypassing the Union and dealing directly with employees individually about working a newly created shift). It is undisputed that Respondent did not deal with the Union regarding the new shift bid, but instead went directly to employees to have them complete the bid. As such, it separately violated Section 8(a)(1) and (5) of the Act.[83]

3. Hymas alleged direct dealing

On at least two different occasions, during his mandatory meetings with workers, Hymas told employees they needed to consider embracing 12 hour shifts and give 2% back to the company. (Tr. 926, 949, 954. 1005-07, 1707-08) To find that an has employer engaged in direct dealing, the evidence must show that: (1) the employer was directly communicating with employees represented by a union; (2) the discussion was for the purpose of establishing working conditions, thereby undercutting the union's role in bargaining; and (3) the communication was made to the exclusion of the union. *El Paso Electric Co.*, 355 NLRB 544, 545 (2010) (citing *Permanente Medical Group*, 332 NLRB 1143, 1144 (2000).

Here, all the employees in the meeting were represented by the Union. Hymas was trying to get employees to agree to the Respondent's contract proposal on extended shifts, even though the proposal was still being bargained, thereby undercutting the Union's role in bargaining. And the communication was made to the exclusion of the Union; no authorized bargaining

[83] I find that Dickey was still a day-pay supervisor at the time, and was Respondent's agent. *Interpace Corp.*, 238 NLRB 560, 563 (1978) (agent's acts were imputable to the employer).

representative was in the meeting. As such, I find that Hymas engaged in direct dealing as alleged in the Consolidated Complaint.

4. Hayden ball mill alleged unilateral change June 2015

Since at least 2010, and perhaps as long as 2004, Respondent has interrupted the regular work schedule for Hayden mechanics whenever a ball mill needs to be relined, putting them on 12 hour shifts, around the clock, until the reline is completed. The steel liners in the mills eventually erode and need to be replaced requiring the mill to be shutdown. Mechanics bid to work on the 12 hour shifts, and when the reline is completed, they return to their normal schedule. This bidding process has been used for years at the Hayden concentrator. (Tr. 222, 1819-24, 1923-32; R. 8-12)

In June 2015, Respondent relined one of its Hayden ball mills, and mechanics were put on 12 hour shifts to perform the reline. About eight employees worked 12 hour shifts from June 29 through about July 5, and were then returned to their regular shifts when the job was completed. The General Counsel alleges the temporary assignment to work on the ball mill reline constitutes an unfair labor practice, relying primarily upon the testimony of Union steward Ralph Garcia ("Garcia"), who testified that nobody specifically notified him that mechanics were going to start working 12 hour shifts. Garcia was attending bargaining from June 29 through July 2, and then went on vacation until July 6. When he returned he learned mechanics had been working 12 hour shifts for the reline. (Tr. 220-23, 646-53; GC. 41)

Shift changes are a mandatory subject of bargaining. *Buck Creek Coal*, 310 NLRB 1240, 1243 (1993) However, where the record shows that the parties have a past practice that occurs "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis," it becomes a "term and condition of employment whose continuation does not require bargaining." *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4, fn. 9 (2015) (internal quotations omitted)

Here, the evidence presented shows that the same process was used for multiple years where mechanics worked 12 hour shifts and then returned to their regular schedule when the mill reline was completed. Thus, mechanics could reasonably believe the practice would reoccur in 2015, and therefore became a term and condition of their employment. *Sunoco, Inc.*, 349 NLRB 240, 244 (2007). As such, I find Respondent did not violate the Act as alleged, and recommend this allegation be dismissed.[84]

5. Elimination of the night shift for certain Hayden employees in June 2015

When Garcia returned from his vacation on July 6 he also learned that Respondent had eliminated the night shift. Four employees worked the night shift, which also paid an extra 45 cents per hour. All employees were now scheduled to work the day shift. Respondent never provided Garcia, with notice that the night shift was being eliminated. (Tr. 653-54)

[84] The Board's decision in *E.I. Dupont de Nemours*, 364 NLRB No. 113, slip op. at 7 (2016) does not change the analysis, as the past practice here was sufficiently fixed to constitute "a predictable change to a discrete term or condition of employment that would be expected to continue in a nondiscretionary, regular manner."

As a defense to this allegation respondent relies upon the testimony of Syd Lloyd, who testified that the night shift was eliminated from the work bid because they were short workers on the day shift. Lloyd discussed the decision making process he went through to eliminate the night shift, which involved discussions between himself and his general supervisors; absent from these discussions is any Union representative. Lloyd testified that about twice since 2012 the night shift was eliminated of the work bid. However, Respondent introduced no documents to substantiate this claim. (Tr. 1934-35)

Respondent also asserts it was privileged to eliminate the night shift because of language in the expired BLA and the Ray Complex supplemental agreement. The BLA contains a provision stating that nothing in the agreement "shall be construed as a guarantee of work or that any particular schedule cannot be changed." The Ray supplement, which Respondent asserts also applies at Hayden, contains a provision that states "schedules and schedule periods are subject to change by the Company." (GC. 4, p. 37; GC. 5, p. 11)

Regarding Respondent's claim that the language in the various contracts privileged its unilateral change, I note that both agreements had expired before the elimination of the night shift occurred. "The Board has held that such contractual reservation of managerial discretion does not extend beyond the expiration of the contract unless the contract provides for it to outlive the agreement. *Blue Circle Cement Co., Inc.*, 319 NLRB 954, 954 (1995); *Blue Creek Coal*, 310 NLRB 1240, fn.1 (1993). The contracts here contain no such provision.

As for the assertion of past practice, Lloyd did not testify that Respondent had previously eliminated the night shift without first providing the Union with notice and an opportunity to bargain. He simply testified that twice, in the preceding four years, the night shift had been eliminated. The evidence is simply silent regarding whether the issue was bargained in the past. Respondent bears the burden of establishing the affirmative defense of a past practice. *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 636 (2001), enfd. 317 F.3d 316 (D.C. Cir. 2003). It has failed to do so here.

Finally, even if the evidence showed that Respondent had twice previously eliminated the night shift unilaterally since 2012 – approximately 7 work bids – this is too sporadic to be considered a past practice; it did not occur on a regular and consistent basis so as to become an established term of employment. See, *Space Needle, LLC*, 362 NLRB No. 11, slip op. at 4, fn. 9 (2015). Accordingly, I find that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally eliminating the night shift for Hayden concentrator mechanics in July 2015.

6. July 2015 shift reduction at the Ray Complex

On July 18, 2015 a water shortage at the Ray mine caused Respondent to run a reduced work crew for the overnight shift. Respondent could not operate all of its water trucks, which are used for dust control requirements, thereby reducing the need for haul truck drivers and other employees. That day, Manuel Carillo ("Carillo"), the mine operations chief supervisor, was monitoring the available water supply. When he learned there was insufficient water to keep running throughout the evening, he spoke with his boss, who then decided to run a reduced crew.

Carrillo called about 8 workers and told them not to come into work that evening because of the water shortage, while 24 other employees worked the night shift. The shift reduction lasted only one day. It is undisputed that Respondent did not notify or bargain with the Union before reducing the shift, or before determining which employees would not work that evening. (Tr. 235-45, 877-79; GC. 42-43)

Respondent argues they were simply maintaining the status quo, as the expired Ray Mine supplemental agreement states that reductions in force for 7 days or less can be made without regard to seniority. Article 3, Section A (2) of the Ray Mine supplemental agreement states that: "Reductions in forces of seven (7) days or less may be made without regard to seniority to meet operating requirements or emergencies." (GC. 5, p.6-7) However, as noted above, unless it is explicitly provided for in the agreement, reservations of managerial discretion do not extend beyond the expiration of the contract *Blue Circle Cement Co., Inc.*, 319 NLRB at 954 (1995). Again, the agreement here contains no such provision. Accordingly, by reducing the shift without bargaining with the Union, Respondent violated Section 8(a)(1) and (5) of the Act.

7. Elimination of the night shift and schedule change in the Ray tire shop

In August 2015 Joe Bentley ("Bentley") worked at the Ray mine tire shop a as a tire repairman assigned to the "C" (or graveyard) shift. Bentley reported to Gary Esquivel ("Esquivel"), the tire shop supervisor. At the tire shop, employees bid on their schedule by seniority twice a year, in December and again in June. During the first half of 2015, the tire shop had three shifts. The "A" shift worked from 7:00 a.m. to 3:30 p.m.; the "B" shift worked from 3:00 p.m. to 11:30 p.m.; and the "C" shift worked from 11:00 p.m. to 7:30 a.m. (Tr. 415-17, 427, 887; GC. 61)

In August 2015 Keith Kenyon, the general haulage supervisor, decided to eliminate the tire shop "C" shift, and make shift changes to other shops he supervised. On August 27, Kenyon emailed Esquivel and his other supervisors a new schedule, telling them to start rebidding their work schedules. Along with eliminating the tire shop "C" shift, the new schedule had all employees working "5-2" schedules, meaning they worked five days straight, and then took two days off. Previously, some employees worked a rotating schedule of seven working days, two days off, then eight working days and four days off. (Tr. 422-23; Tr. 1999-2002; GC. 60)

Bentley testified that, in an August safety meeting Esquivel told the tire shop employees they were no longer going to have a "C" shift, and that he had a new schedule in his office for them. Bentley went to the office and picked up his new work schedule, which showed he was now assigned to the "A" shift. Bentley's last day on the "C" shift was August 30. According to Bentley, none of the tire shop employees had an opportunity to bid on a new shift. At the time, there was no Union steward assigned to their work group, and instead workers would go directly to Union President Manny Armenta Jr. with any issues.[85] Esquivel admitted that he never notified the Union before the new schedule went into effect. According to Esquivel, Adrian Contreras was the last person who submitted his bid September 11. (Tr. 433-34, Tr. 889-95)

[85] Armenta Jr. testified that Respondent never notified him about the change. (Tr. 1283)

Regarding the new schedule, Kenyon testified that he presented it to someone named Justin McNabish before it took effect. Kenyon believed that McNabish was a union representative for Steelworkers Local 915, saying that McNabish was part of "every disciplinary action," and "signs off on all documents" dealing with the contracting out of repairs. Nevertheless, Kenyon had never received any documents showing McNabish was, in fact, a Union representative, and Respondent introduced no documents containing McNabish's signature or showing his purported position with the Union. (Tr. 2003-05; Tr. 2013-14)

According to Kenyon, he and his clerk met with McNabish, gave him the schedule, and McNabish asked him to identify which mechanics would work in the pit, instead of the shop, which he did. Kenyon claims McNabish also asked him to denote which mechanic would work in the field, but Kenyon would not do so. Afterwards Kenyon told his clerk to send the schedule to the supervisors. (Tr. 2003-06)

Based upon demeanor, I credit Bentley's testimony over that of Esquivel as to what occurred regarding the new tire shop schedule. I also note that Esquivel admitted the new schedule was completed in his handwriting. (Tr. 434; GC. 61) That handwritten schedule states that it was effective "September 2015" and shows all tire shop employees being scheduled on the "A" and "B" shift for the entire month of September. As of September 1, it shows Bentley assigned to the "A" shift, and Contreras to the "B" shift.[86] Thus Contreras was assigned to the "B" shift even before he allegedly submitted his bid on September 11. Therefore, I find that Esquivel did not re-bid the schedule, but instead completed a new schedule himself, handed it out to employees, and that tire shop employees started working this schedule on September 1.

As for Kenyon's purported meeting with McNabish, there is something not believable in this representation of the events, and I therefore do not credit Kenyon's testimony. Other than his testimony, there is no evidence that McNabish actually exists, or that he represented the Union. A search of the record evidence shows that McNabish's name only appears in Kenyon's testimony. Notwithstanding Kenyon's claim that McNabish "signs off on all documents" pertaining to contracting out of repairs, and is present for every progressive discipline, Respondent introduced no such documents. Accordingly, I find Respondent has failed to show that notice was given to the Union representative authorized for the purpose of receiving notice to changes in work schedules.[87] *California Portland Cement Co. v. NLRB*, 19 Fed.App'x 683, 684–85 (9th Cir. 2001) (enforcing Board's finding that notice given to union steward was inadequate as the steward was not the union's agent for purposes of receiving notice of unilateral changes in job duties). Accordingly, I find that Respondent violated Section 8(a)(1) and (5) by unilaterally eliminating the night shift and changing the tire shop schedule, as alleged.

8. Respondent's impasse declaration and implementation of the Final Offer

Regarding the Consolidated Complaint's impasse allegations it is important to note what the government does and does not allege. The General Counsel does not allege that

[86] Thus, Contreras was assigned to the "B" shift even before Esquivel claimed Contreras submitted his bid on September 11.

[87] Respondent cannot rely on the language in the expired BLA, or Ray supplemental agreement to privilege its actions, as both agreements had expired. See *Blue Circle Cement Co.*, Inc., 319 NLRB 954, 954 (1995).

Respondent's course of bargaining precluded a valid impasse.[88] Instead, the Consolidated Complaint alleges that Respondent implemented the terms of its Final Offer at a time when no overall good faith impasse could have existed because of unremedied unfair labor practices. This theory was confirmed by the General Counsel at hearing.[89] (Tr. 23, 452-54)

"In the absence of a lawful, good-faith impasse, an employer may not unilaterally implement its final contract offer;" generally impasse cannot be reached in the presence of unremedied unfair labor practices. *Dynatron/Bondo Corp.*, 333 NLRB 750, 752 (2001) (citing *White Oak Coal*, 295 NLRB 567, 568 (1989)). However, not all unremedied unfair labor practices committed before or during negotiations will preclude a good-faith impasse. Id. (citing *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999). "Only serious unremedied unfair labor practices that affect the negotiations will taint the asserted impasse." Id. (internal quotation omitted). Unremedied unfair labor practices can contribute to an inability to reach an agreement in at least two ways: (1) they can increase the friction at the bargaining table; and (2) a unilateral change can move the baseline for negotiations, by altering the status quo, and change the parties' expectations about what they can achieve, thereby making it harder for the parties to reach an agreement. *Alwin Mfg. Co., Inc., v. NLRB*, 192 F.3d 133, 139 (DC. Cir. 1999). Applying these standards here, I find that the unremedied unfair labor practices found herein did not affect the negotiations, and therefore did not taint the parties' impasse.

The evidence shows that, as of May 15, 2015, when the Respondent submitted its Final Offer, the parties' positions were primarily entrenched. By this date the parties had been bargaining for two years, and had tentatively agreed to over 70 different clauses, proposals, or letters of understanding; the last group of tentative agreements were signed on April 9, 2015. (R. 2; GC. 14)

As of May 15, the only unremedied unfair labor practices were those relating to the unlawful handbook rules, and one incident of interrogation. Respondent's supervisors asked mill operator Mario Padilla if he knew when the Union was going to strike, and whether he would join the strike. The evidence does not show that this one incident of interrogation, along with the handbook rules, had any impact whatsoever on negotiations.

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[88] There are no allegations of surface or bad-faith bargaining in the Consolidated Complaint. *See*, *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (elements indicating bad faith bargaining include: delaying tactics, unreasonable bargaining demands, unilateral changes, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meeting); see also *Local Union No. 103, Iron Workers*, 195 NLRB 980 (1972), enfd. 1972 WL 3074 (7th Cir. 1972) (per curiam) (respondent's course of bargaining conduct which included fixed inflexible positions and a ridged unwillingness to seriously consider alternative proposals precluded a lawful impasse).

[89] Before the proceeding opened, the Union argued that it should be allowed to introduce course of bargaining evidence to show there was no good faith impasse. In a pretrial order, and again at the hearing, I noted that, given the outstanding complaint allegations, course of conduct bargain evidence was relevant to show whether a causal connection existed between the alleged unremedied unfair labor practices and the subsequent deadlock in negotiations, including the effect of the unilateral changes on the bargaining process and the issue of the employer's good faith in light of such changes; at trial I requested the parties focus on such evidence. I also urged the parties to make offers of proof, and otherwise preserve the record if they intended to appeal my evidentiary rulings on this issue. (Tr. 475, 1403-05; GC. 1(a)(k), fn.3)

Between the May 15 Final Offer and Respondent's impasse declaration, significant unfair labor practices occurred including: multiple instances of interrogation; threats of layoffs; the discharge of Manual Orcasitas; direct dealing; failure to provide information; and five instances of unilateral changes, including the elimination of the Hayden Smelter and Ray Tire Shop night shifts, and changing employee schedules at the Ray Tire Shop and the Shovel & Drill department. That being said, the evidence does not show that these unfair labor practices, although significant, in any way: (1) increased the friction at the bargaining table; or (2) moved the baseline for negotiations, thereby making harder for the parties to reach agreement.

While it is undisputed that the parties met for bargaining after May 15, there is limited evidence of what transpired at these meetings, and no evidence that any of the unfair labor practices increased friction at the bargaining table. Regarding moving the baseline for negotiations, this baseline was set on May 15, the date of the Final Offer. And, again, the evidence is lacking that any of the unremedied unfair labor practices moved the negotiation baseline whatsoever.

The Union's bargaining proposals on May 15, 2015, June 5, 2015 and December 10, 2015, during the time frame when the significant unfair labor practices occurred, are generally consistent.[90] In all three, the Union agrees to withdraw its proposed, agrees that the copper price bonus will not go into effect until the price of copper reaches $2.60 per pound, and is capped at $4.00 per pound or higher. Indeed, the only recognizable difference between the three proposals is the Union's proposed wage increase, which decreased from an hourly raise of $1.75 per hour, to $1.60 per hour, to $1.50 per hour. However, no evidence was presented that this change was in any way precipitated by any of the unremedied unfair labor practices found herein.

Both the General Counsel and the Union argue that the outstanding information requests undermined the Union's bargaining power, thereby precluding impasse. I disagree.

Regarding the copper price bonus information request, Respondent had already provided the Union with sufficient information to calculate the impact of the copper price bonus for 2011, 2102, 2103, and 2014. While ASARCO did not provide sufficient information to calculate the impact for the first three quarters of 2015, the evidence does not show that this precluded the Union from bargaining effectively, or otherwise made it more difficult for the parties to reach an agreement. Indeed, the Union's copper price bonus proposals were exactly the same in their May 15, June 5, and December 14 proposals. Bonuses would not start until the price of copper reached $2.60 per pound which, in comparison to the BLA, would reduce employee pay anywhere from $1,080 to $4,104 annually when the price of copper was between $1.60 and $2.59 per pound. However, under the Union's proposals this decrease would be offset through wage increases of over $3,000 per year.[91] As such, it appears the Union had more than sufficient information to craft its proposals, proposing to trade off the vagaries of a bonus based on the future price of copper for a guaranteed wage increase. Therefore, I find that Respondent's

[90] See GC. 103 (Union's May 15, 2015 proposal); GC. 15 (Union's June 5, 2015 proposal); and GC. 24 (Union's December 14, 2015 proposal).

[91] Assuming a 40 hour work week, at the Union's proposed wage increases of $1.50 to $1.75, annually it would be between $3,120 to $3,640.

failure to provide information regarding the 2015 copper price bonus did not detrimentally affect negotiations or make it harder for the parties to reach agreement.

The same is true regarding the employer's failure to provide information regarding post-retiree healthcare. The only information the Union received was an extremely outdated summary plan document, along with "very rough" actuarial estimates using flawed assumptions. Nevertheless, the unremedied unfair labor practices must "affect the negotiations" in order to "taint the asserted impasse." *Dyatron/Bondo Corp.*, 333 NLRB at 752. And here the evidence falls short. Every bargaining proposal in evidence from the Union regarding retiree healthcare is identical, and there is insufficient evidence to show that the Union's lack of information adversely affected negotiations.[92] This is particularly true since, under the implemented Final Offer, employees retiring during the agreement's term are eligible for retiree health benefits, as they were under the expired BLA. Thus, for employees covered by the agreement and eligible to retire, there was little change from the existing status quo. The change involved employees who will be eligible for retirement after the expiration of the new agreement. However, for these employees Respondent will once again be required to bargain in good faith with the Union about this topic when the parties negotiate for a successor agreement. Thus, in practice, the Final Offer simply pushes this issue into the future. As such, I find that the unremedied information request regarding future retiree benefits did not detrimentally affect the negotiations so as to taint Respondent's impasse declaration.[93]

In sum, I find that the unremedied unfair labor practices set forth herein, while severe, did not detrimentally affect negotiations for a new collective-bargaining agreement or contribute to the deadlock between the parties. Accordingly, I recommend paragraphs 7(t) and 7(x) of the Consolidated Complaint be dismissed.

9. January 2016 change to employee schedules in the Mission truck shop

On December 7, 2015, Human Resources Manager Tim Shields met with Kevin Hampton and Bradford White, chief stewards for the Union, and presented them with a letters stating that Asarco proposed to implement extended (12 hour) shifts at the Mission Complex truck shop, and asking for input from the Union. At the time, employees in the truck shop worked 8 hour shifts. The Union told Shields that extended shifts were an open item at negotiations, and the matter needed to be bargained by the parties at the "big table" and not at the local level.[94] (Tr. 583-591, 1234-44, 1247-50, 1262; GC. 78-80)

The issue was discussed briefly at "big table" negotiations on December 14. Manny Armenta Jr. asked whether Respondent wanted to discuss the proposal, and Sinele replied that it was not a proposal but the company was merely informing the Union and asking for their input. (Tr. 1251) Extended schedules were implemented in the Mission Truck Shop on January 4, 2016. (Tr. 591)

[92] See GC. 102 (May 11, 2015 proposal); GC. 103 (Union's May 15, 2015 proposal); GC. 15 (Union's June 5, 2015 proposal); and GC. 24 (Union's December 14, 2015 proposal).
[93] There is similarly a lack of evidence showing that the failure to produce the requested UCR information detrimentally affect negotiations contribute to the deadlock between the parties.
[94] The Union again told Shields the issue must to be bargained at the "big table" on December 23. (Tr. 1247-53)

The General Counsel alleges that respondent violated the Act by implementing extended schedules without providing the Union with notice or an opportunity to bargain. However, because I find that Respondent's impasse declaration and the subsequent implementation of its Final Offer was not unlawful, ASARCO's implementation of extended schedules was allowed. The implemented extended work schedule conformed with the extended shift proposals Respondent had previously submitted to the Union and was part of its Final Offer. *Chicago Local No. 458-3M v. NLRB*, 206 F.3d 22, 34 (D.C. Cir. 2000) (Because the parties were at impasse, employer was permitted to implement its final offer, including new work schedules). As such, I recommend paragraph 7(u) of the Consolidated Complaint be dismissed.

10. Alleged refusal to meet since January 2016

In mid-December 2015, the Union requested the parties meet, and indicated they were available the weeks of January 4 and January 18, 2016. Respondent replied, saying they were available to meet on January 20, and were working on securing a location. (GC. 27)

On December 29, Respondent sent a letter asking whether the Union was prepared to accept the Final Offer. The Union replied, insisting the parties were not at impasse, were continuing to engage in productive bargaining, and saying that the Union looked forward to meeting with the company on January 20, 2016. On January 11, the Union sent a letter to Respondent inquiring as to the location of the January 20 meeting, and stating that the Union would be ready to discuss alleged unilateral changes that had occurred since June 2015. ASARCO replied stating that it was not willing to use "big table" bargaining to discuss unilateral changes at individual facilities, but instead would arrange meetings with the Union at the individual locations in question. Because there were no other issues to discuss, Respondent took the position that there was no need for a big table bargaining session on January 20. On January 12, the Union sent a letter protesting Respondent's stance, and saying that the Union had other matters to discuss at the scheduled meeting, including matters the parties reviewed at a recent health care subcommittee bargaining meeting. Therefore, the Union again asked about the scheduled time and venue for the January 20 meeting. ASARCO responded saying that the healthcare subcommittee had conformed the plan documents to the terms of the Final Offer and there was no need to spend time and money for a "big table" meeting to revisit these documents. On January 14 the Union informed the company that it had secured a location for the January 20 meeting at a hotel in Tucson, Arizona, and was ready to start at 10:00 a.m., as they had significant issues to discuss. The next day Respondent informed the Union that it would not attend the meeting. The Union appeared at the time and place they designated for the meeting, but Respondent did not attend. (Tr. 1469; GC. 28-35)

Based on this background the General Counsel alleges that ASARCO violated Section 8(a)(5) of the Act by refusing to meet and bargain with the Union about changes Respondent made to employee working conditions. However, ASARCO was not refusing to meet with the Union about these alleged unilateral changes. Instead, the parties were arguing over the location of the proposed meeting, with Respondent seeking to meet at the local work sites where the purported changes occurred, and the Union insisting on having a central "big table" meeting in Tucson to discuss this, and other issues. Concerning Respondent's stance that the parties meet at

the individual locations where employees actually work to discuss the alleged unilateral changes, I find the position reasonable and does not constitute a refusal to bargain. See *Somerville Mills*, 308 NLRB 425, 426, 437-38 (1992), enfd. 19 F.3d 1433 (6th Cir. 1994) (table).

Regarding the Union's request for a "big table" meeting on January 20, Respondent already had implemented the Final Offer, and the Union had presented no new proposals since their last meeting. Moreover, there was nothing in the Union's correspondence "to give sufficient indication of changed circumstances to suggest that [big table] bargaining might be fruitful." *Holiday Inn Downtown-New Haven*, 300 NLRB 774, 776 (1990). Also, the As such, under these circumstances, I find that Respondent's decision to not attend the January 20, 2016 proposed meeting does not constitute a violation and I recommend that paragraph 7(z) of the Consolidated Complaint be dismissed.

CONCLUSIONS OF LAW

1. By maintaining an overly broad conflict of interest rule in its Code of Conduct, Respondent has violated Section 8(a)(1) of the Act.

2. By maintaining a disclosure rule in its Code of Conduct that prohibits employees from: (a) responding to media inquiries; (b) discussing company matters with anyone outside the company except in the ordinary course of business as required by their job duties; and (c) disclosing non-public information in the absence of a confidentiality agreement, Respondent has violated Section 8(a)(1) of the Act.

3. By maintaining an information systems rule in its Code of Conduct that prohibits employees from engaging in solicitation or sending mass emails, Respondent has violated Section 8(a)(1) of the Act.

4. By maintaining an email, internet, and voicemail usage rule in its Code of Conduct that prohibits offensive or disruptive messages, Respondent has violated Section 8(a)(1) of the Act.

5. By maintaining a fundraising and solicitation rule in its Conflict of Interest Policy that prohibits employees from engaging in solicitation on nonworking time, Respondent has violated Section 8(a)(1) of the Act.

6. By maintaining an overly broad rule in its Conflict of Interest Policy stating that employees have a primary duty to represent ASARCO at all times to the best of their ability, Respondent has violated Section 8(a)(1) of the Act.

7. By interrogating employees about whether they or their coworkers intend to strike, join a picket line, or cross a picket line, Respondent has violated Section 8(a)(1) of the Act.

8. By threatening to close operations if employees engaged in a strike, Respondent has violated Section 8(a)(1) of the Act.

9. By interrogating employees about their union meetings, the union's intention to call a strike, and whether there is support amongst employees to strike, Respondent has violated Section 8(a)(1) of the Act.

10. By threatening employees with layoff if they did not accept Respondent's proposal on extended shifts, Respondent has violated Section 8(a)(1) of the Act.

11. By discharging Manuel Orcasitas because of his union and protected concerted activities, Respondent has violated both Section 8(a)(1) and Section 8(a)(3) of the Act.

12. By failing and refusing to provide the Union with information it requested regarding: (1) the estimated usual, customary, and reasonable (UCR) reimbursements for procedures within the relevant geographic area; and (2) the actual mathematical formula used to determine the UCR, along with the inputs into the formula and how those inputs are determined, Respondent has violated Section 8(a)(1) and (5) of the Act.

13. By failing and refusing to provide the Union with the information it requested on November 4, 2015, regarding (1) the copper price bonus, (2) the breakeven cost of production; and (3) retiree healthcare, including costs of future retiree healthcare, Respondent has violated Section 8(a)(1) and (5) of the Act.

14. By unilaterally implementing a new work schedule bid in the Ray Complex shovel & drill department, Respondent has violated Section 8(a)(1) and (5) of the Act.

15. By bypassing the Union and dealing directly with employees about bidding a new work schedule in the Ray Complex shovel & drill department, Respondent has violated Section 8(a)(1) and (5) of the Act.

16. By bypassing the Union and dealing directly with employees about accepting ASARCO's proposal on extended shifts, Respondent has violated Section 8(a)(1) and (5) of the Act.

17. By unilaterally eliminating the night shift for Hayden concentrator mechanics, Respondent has violated Section 8(a)(1) and (5) of the Act.

18. By unilaterally reducing the shift on July 18, 2015, at the Ray Complex, Respondent has violated Section 8(a)(1) and (5) of the Act.

19. By unilaterally eliminating the night shift and changing the tire shop schedule at the Ray Complex, Respondent has violated Section 8(a)(1) and (5) of the Act.

20. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that Respondent violated Sections 8(a)(1) and 8(a)(3) of the Act by discharging Manuel Orcasitas, I shall order Respondent to offer him full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice of his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

Respondent shall compensate Orcasitas for any adverse tax consequences of receiving a lump-sum backpay award. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016). Respondent shall also compensate Orcasitas for his search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. *King Soopers, Inc.*, 364 NLRB No. 93 (2016).

Respondent shall make employees whole for any loss of earnings or benefits suffered as a result of the company's failure to bargain over: the change in schedules at the Ray Complex; the elimination of the night shift at the Hayden concentrator; the elimination of the night shift at the Ray Complex; and reducing or changing shifts/schedules at the Ray Complex.

Backpay, search-for-work, and interim employment expenses, shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010) enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

Additionally, Respondent shall file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

The Respondent shall also be required to expunge from its files any and all references to Orcasitas's discharge and notify Orcasitas and the Regional Director of Region 28 in writing that this has been done and that him wrongful discharge will not be used against him in any way. The Respondent shall also post the notice in accordance with *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[95]

ORDER

The Respondent, ASARCO LLC, its officers, agents, successors, and assigns, shall:

1. Cease and desist from

(a) Maintaining an overly broad conflict of interest rule in its Code of Conduct, or anywhere else.

(b) Maintaining rules in its Code of Conduct, or anywhere else, prohibiting employees from: (1) responding to media inquiries; (2) discussing company matters with anyone outside the company except in the ordinary course of business as required by their job duties; (3) disclosing non-public information in the absence of a confidentiality agreement; (4) engaging in solicitation; (5) sending mass emails; or (6) sending offensive or disruptive messages.

(c) Maintaining rules in its Conflict of Interest Policy, or anywhere else, requiring employees: (1) obtain permission before engaging in lawful solicitation; or (2) avoid, to the best of their ability, situations interfering with their primary duty of representing Respondent at all times.

(d) Threatening to close operations if employees engaged in a strike.

(e) Threatening employees with layoff if they did not accept a proposal on extended shifts.

(f) Coercively questioning employees about whether they or their coworkers intend to strike, join a picket line, or cross a picket line.

(g) Coercively questioning employees about their union meetings, their union's intention to call a strike, and whether there is support amongst employees for a strike.

(h) Discharging or otherwise discriminating against employees for engaging in union activities or concerted activities protected by Section 7 of the Act.

(i) Refusing to provide the Union with requested information that is relevant and necessary to the Union's performance of its duties as the collective-bargaining representative of Respondent's employees.

[95] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(j) Refusing to bargain with the Union by unilaterally: (1) implementing a new shift bidding schedule; (2) eliminating shifts; (3) reducing shifts; (4) changing work schedules, or changing any other term and condition of employment.

(k) Bypassing the Union and dealing directly with employees regarding: (1) bidding a new work schedule; (2) accepting a proposal on extended shifts, or any other term and condition of their employment.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the unlawful language contained in the Code of Conduct and Conflict of Interest Policy, advise employees the unlawful rules have been rescinded, and provide them with the language of the lawful rules.

(b) On request, rescind the work schedule consisting of rotating shifts for apprentices in the Ray Complex shovel and drill department.

(c) On request, restore the night shift for the Hayden concentrator.

(d) On request, restore the Ray tire shop night shift and work schedules as they existed on August 1, 2015.

(e) Make employees whole for any earnings loss of earnings or other benefits suffered as a result of the failure to bargain over: the change in schedules at the Ray Complex; the elimination of the night shift at the Hayden concentrator; the elimination of the night shift at the Ray Complex; and reducing or changing shifts at the Ray Complex.

(f) Promptly provide the Union with the information it requested in October and November 2015, including: (1) the estimated usual, customary, and reasonable (UCR) reimbursements for procedures within the relevant geographic area; and (2) the actual mathematical formula used to determine the UCR, along with the inputs into the formula and how those inputs are determined.

(g) Promptly provide the Union with the information it requested on November 4, 2015, including information regarding: (1) the copper price bonus; (2) the breakeven costs of production, (3) retiree healthcare; and (4) costs of future retiree healthcare.

(h) Within 14 days from the date of this Order, offer Manuel Orcasitas full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(i) Make whole Manuel Orcasitas whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(j) Compensate Manuel Orcasitas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(k) Within 14 days from the date of this Order, remove from its files any references to its unlawful discharge of Manuel Orcasitas, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

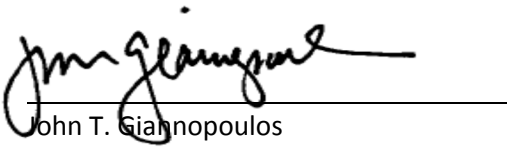
(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of the Order.

(m) Within 14 days after service by the Region, post at its facilities, including its facilities at Hayden, the Ray Complex, Mission Complex, Amarillo Refinery, and the Silver Bell Mine, copies of the attached notice marked "Appendix."[96] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facilities any time since June 24, 2015.

(n) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[96] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. June 28, 2017



John T. Giannopoulos
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose a representative to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain an overly broad conflict of interest rule in our Code of Conduct or anywhere else.

WE WILL NOT maintain rules in our Code of Conduct, or anywhere else, that prohibits you from: (1) responding to media inquiries; (2) discussing matters with anyone outside the company except in the ordinary course of business as required by your job duties; or (3) disclosing non-public information in the absence of a confidentiality agreement.

WE WILL NOT maintain a rule in our Code of Conduct, or anywhere else, that prohibits you from: (1) engaging in lawful solicitation; (2) sending mass emails; or (3) sending offensive or disruptive messages

WE WILL NOT maintain a rule in our Conflict of Interest Policy, or anywhere else, requiring you to: (1) obtain permission before engaging in lawful solicitation; or (2) avoid situations interfering with your primary duty of representing ASARCO at all times.

WE WILL NOT coercively question you about you're your union activities or the union activities of your coworkers.

We WILL NOT coercively question you about whether you or your coworkers intend to strike, intend to join a picket line, or cross a picket line.

WE WILL NOT coercively ask you about your union meetings, whether the union intends to call a strike, or whether employees support a strike.

WE WILL NOT threaten to close our facilities if employees strike.

WE WILL NOT threaten you with layoff if you don't accept a proposal to work extended shifts.

WE WILL NOT refuse to provide your union with information it requested that is relevant and necessary to the performance of its duties as your collective-bargaining representative.

WE WILL NOT deal directly with you regarding bidding a new work schedule, accepting extended shifts, or any other term or condition of employment.

WE WILL NOT refusing to bargain with your union by unilaterally: (1) implementing a new shift bidding schedule; (2) eliminating shifts; (3) reducing shifts; (4) changing work schedules, or changing any other term and condition of your employment.

WE WILL NOT discharge or otherwise discriminate against you for engaging in union activities or for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the unlawful language contained in our Code of Conduct and Conflict of Interest Policy.

WE WILL furnish all current employees with inserts for our Code of Conduct and Conflict of Interest Policy that: (1) advise that the unlawful rules have been rescinded, or (2) provide the language of the lawful rules; or publish and distribute to all current employees a revised Code of Conduct and a revised Conflict of Interest Policy that does not contain the unlawful rules

WE WILL, on request, rescind rotating shift schedules for apprentices in the Ray Complex shovel and drill department

WE WILL, on request, restore the night shift at the Hayden concentrator.

WE WILL, on request, restore the Ray Complex tire shop night shift and work schedules as they existed on August 1, 2015.

WE WILL, on request, make employees whole for any earnings loss of earnings or other benefits suffered as a result of the failure to bargain over: the change in schedules at the Ray Complex; the elimination of the night shift at the Hayden concentrator; the elimination of the night shift at the Ray Complex; and the change or reduction in shifts at the Ray Complex.

WE WILL, promptly provide the Union with the information it requested in October and November 2015, including: (1) the estimated usual, customary, and reasonable (UCR) reimbursements for procedures within the relevant geographic area; and (2) the actual mathematical formula used to determine the UCR, along with the inputs into the formula and how those inputs are determined.

WE WILL, promptly provide the Union with the information it requested on November 4, 2015, including information regarding: (1) the copper price bonus; (2) the breakeven costs of production, (3) retiree healthcare; and (4) costs of future retiree healthcare.

WE WILL, within 14 days from the date of the Board's Order, offer Manuel Orcasitas full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Manuel Orcasitas whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Manuel Orcasitas for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Manuel Orcasitas, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

ASARCO LLC

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

2600 North Central Avenue; Suite 1400; Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-154886 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (602) 416-4755.